Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
_____ Term, 2001

ROBERT G. HILGER and
GAY E. HILGER,

Petitioners

v.

EDITH M. LAWRENCE and the
EDITH M. LAWRENCE TRUST,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court, or alternatively, To The Michigan Court Of Appeals

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PETITION FOR WRIT OF CERTIORARI

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116 pp

QUESTION PRESENTED

1. When a State court is asked to rule summarily on the evidence presented by the parties in a civil action where the right to trial by jury exists under the law of the State, does the Due Process Clause of the Fourteenth Amendment require that a State court refrain from making findings of fact or assessing the relative weight to be afforded such evidence, and thereby preclude a manner of proceeding by which the State court might otherwise undertake to substitute its own judgment for that of the jury to which the function of fact-finding is entrusted in accordance with longstanding and well established common-law practice?

LIST OF PARTIES TO THE PROCEEDING

Petitioners

The petitioners in this case are Robert G. Hilger and his wife, Gay E. Hilger, who were the sole plaintiffs and appellants in the course of the proceedings below.

Respondents

The respondents in this case are Edith M. Lawrence and the Edith M. Lawrence Trust, the latter being the owner, and the former being the occupant of the premises on which petitioner Robert Hilger was injured on August 15, 1994. These respondents were the sole defendants and appellees in the course of the proceedings below.

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT G. HILGER and
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v.

EDITH M. LAWRENCE and the
EDITH M. LAWRENCE TRUST,
Respondents.

Petition For A Writ Of Certiorari To The Michigan Supreme Court, or alternatively, To The Michigan Court Of Appeals

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The Petitioners, Robert G. and Gay E. Hilger, respectfully pray that a writ of certiorari issue to review the order of the Michigan Supreme Court entered in the above entitled proceeding on December 27, 2000, or alternatively, Petitioners pray that a writ of certiorari issue to review the opinion of the Michigan Court of Appeals entered in the above entitled proceeding on September 7, 1999, for each of the reasons stated herein.

OPINIONS BELOW

The Wayne County Circuit Court rendered the initial opinion in this matter at a hearing on respondents' motion for summary disposition held on June 11, 1997. The Circuit Court's opinion is set forth in a transcript of that hearing which is reprinted in the appendix hereto, beginning at p. A1. The Court's written order granting respondents' motion for summary disposition and dismissing petitioners' complaint is set forth at p. A10.

The unpublished, *per curiam* opinion of the Michigan Court of Appeals has not been officially reported, and it is reprinted in the

appendix hereto, beginning at p. A24. That opinion is preceded by a copy of the transcript of the hearing on oral arguments before the Michigan Court of Appeals, which is reprinted in the appendix hereto, beginning at p. A11. The Michigan Court of Appeals' order denying rehearing is reprinted in the appendix hereto, at p. A27.

The Michigan Supreme Court's September 12, 2000 order denying petitioners' application for leave to appeal is reprinted in the appendix hereto, at p. A28, and the Michigan Supreme Court's order denying reconsideration, entered on December 27, 2000, is reprinted in the appendix hereto, at p. A29.

JURISDICTION

Petitioners filed this civil action in the State of Michigan, Wayne County Circuit Court, bringing tort claims under the State common-law of premises liability and seeking redress for permanent and disabling bodily injuries suffered by Robert Hilger on August 15, 1994. No federal question was involved at the trial court level, and no federal question was involved in the Hilger's appeal as of right from the trial court's ruling which had granted summary disposition for the respondents on a singular ground, a ground which the Michigan Court of Appeals would later be constrained to, and ultimately did, recognize as having been erroneous and contrary to Michigan law.

The federal question presented in this matter first arose only upon, and as a direct result of, the disposition and dismissal of the petitioners' claims by the Michigan Court of Appeals, on alternative grounds not previously ruled upon by the trial court in the first instance, as evidenced by the Court of Appeals opinion issued on September 7, 1999 and its denial of petitioners' motion for reconsideration on November 19, 1999. Petitioners maintain that it is the very manner in which the Michigan Court of Appeals proceeded to dispose of their claims -- by making arbitrary findings of fact and selectively weighing the conflicting record evidence, thereby usurping the well established common-law function and the exclusive fact-

finding province of the jury -- which violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution, for each of the reasons set forth more fully in the main body of this Petition.

Under Michigan law, the only avenue for review of the Court of Appeals decisions which gave rise to the federal question presented in this case was by way of application for leave to appeal to the Michigan Supreme Court. The petitioners therefore filed a timely application for leave to appeal to the Michigan Supreme Court and argued, *inter alia*, that "The summary judgment procedure cannot be utilized in such a manner as to impinge upon a party's right to due process, and to trial of disputed factual issues by a jury, as guaranteed under the provisions of both the State and Federal Constitutions." (Application for Leave to Appeal, p. 14). After leave to appeal was initially denied by order of the Michigan Supreme Court on September 12, 2000, the federal Constitutional issue was again presented to the Michigan Supreme Court as the primary subject of the petitioners' motion for reconsideration filed on October 3, 2000.

The date of the final order of the Michigan Supreme Court sought to be reviewed is December 27, 2000. On that date, a majority of the Michigan Supreme Court issued an order denying the petitioners' motion for reconsideration and stated therein that the Court had considered the arguments advanced in the motion and had found no error. Without elaboration of the reasoning employed by the majority in rejecting the claim that petitioners' Due Process rights had been violated, the Court ruled as follows:

> On order of the Court, the motion for reconsideration of this Court's order of September 12, 2000, is considered, and it is DENIED, because it does not appear that the order was entered erroneously.
>
> Cavanagh, J., would grant reconsideration, and on reconsideration, would grant leave to appeal.

The jurisdiction of this Honorable Court is thus invoked pursuant to 28 U.S.C.§1257(a) which sets forth the Court's authority to review "The final judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

Alternatively, because the federal question arose only when the Michigan Court of Appeals finally disposed of the petitioners' case on grounds not previously ruled upon by the trial court in the first instance, and because no appeal as of right could be had from the Court of Appeals' ruling in this matter, the question of which Court may properly be issued the writ of certiorari is reasonably subject to debate where, as here, discretionary review was ultimately denied by the Michigan Supreme Court – though the Michigan Supreme Court indicated it had considered the federal question and had found no error when it ruled upon, and denied, the motion for reconsideration which again presented the issue of a violation of petitioners' Due Process rights.

Under the unique circumstances presented here, the petitioners therefore respectfully request, in the alternative, that a writ of certiorari issue to review the decision of the Michigan Court of Appeals entered on September 7, 1999, if for any reason this Honorable Court should determine that the Michigan Court of Appeals is the appropriate court to which the writ of certiorari may issue pursuant to 28 U.S.C.§1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., Art. XIV, Sec. 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Const. (1963), Art. I, Sec. 14:

Jury Trials

Sec. 14. The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. In all civil cases tried by 12 jurors a verdict shall be received when 10 jurors agree.

STATEMENT OF THE CASE

A full, chronological exposition of the facts and proceedings below would reveal that no federal question arose until the latter stages of this case, when the Michigan Court of Appeals disposed of petitioners' appeal of right by dismissing their claims on grounds that had not previously been ruled upon by the trial court in the first instance and then denied their motion for reconsideration, thereby depriving petitioners of the right to trial by jury -- a right created by, and expressly guaranteed them under, the laws of the State of Michigan; a substantial right with respect to which the petitioners claim a liberty interest subject to the full protections of the Due Process Clause of the Fourteenth Amendment.

It is necessary, at the outset, to summarize some of the pertinent facts which gave rise to the federal question presented here,

prior to considering, in greater detail, all that came before.

Petitioner, Robert Hilger, was seriously injured while mowing the fields on respondents' premises when the tractor he was operating struck a log concealed beneath the tall grass and weeds, causing the tractor suddenly to rear up and tip to one side, dislodging Hilger from his seated position and crushing his leg under the force of the moving tractor. On the record, during his deposition in the course of discovery, Robert Hilger himself expressly identified a log on respondents' premises as the object which had caused the tractor to tip and to crush his leg. See p. A45, *infra*. However, in disposing of the case and ruling in the first instance on an issue which had not been ruled upon by the trial court, the Michigan Court of Appeals proceeded arbitrarily to find, as a matter of fact, that Mr. Hilger "never identified what caused the tractor to tip." See p. A26, *infra*.

The evidence adduced in discovery also revealed that respondent, Edith Lawrence, was aware of a dangerous condition on her premises, based upon her admitted knowledge of the "wood piled everywhere", the "tall weeds" and "high grass", as well as the "junk piled back there . . . along the fence lines". See pp. A68-A78, *infra*. Nonetheless, the Michigan Court of Appeals proceeded once again to rule on an issue which had never been decided by the trial court in the first instance, and to find arbitrarily, as a matter of fact, that not only did respondent have no actual knowledge, but that respondent also, "was in no position to know if there was a dangerous condition" on the premises.

Based on the foregoing, and as set forth in greater detail hereafter, Petitioners assert a deprivation of property and liberty interests, in violation of the rights guaranteed them under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, as a direct result of the ruling of the Michigan Court of Appeals by which that Court selectively weighed the record evidence and improperly made findings of fact in passing on the respondents' motion for summary disposition, then proceeded on that

basis to arbitrarily dispose of the petitioners' cause of action (a property interest created by State law), and to deprive them of the right to trial by jury (a liberty interest created, as well, by State law, pursuant to the express provisions of the Michigan Constitution (1963), Art. I, §14) in a manner contrary to a longstanding, and well-established common-law protection against arbitrary adjudication which has traditionally recognized a fundamental distinction between the proper roles and functions of the judge and of the jury, and has reserved the ultimate determination of issues of fact for the jury alone.

An examination of the manner in which this case reached its present stage, including a review of the record evidence and the original proceedings before the trial court, reveals that petitioners Robert and Gay Hilger filed their Complaint on September 22, 1995, in the State of Michigan, Wayne County Circuit Court. As indicated above, this is a premises liability action arising out of the injuries suffered by Mr. Hilger on August 15, 1994, when the tractor he was operating while mowing the fields on respondents' premises struck a log hidden from view beneath the tall grass, which caused the tractor to tip and to crush Mr. Hilger's left lower extremity.

Robert Hilger was 45 years of age on August 15, 1994. He had married his wife, Gay, in December, 1991. Gay's parents -- respondent Edith Lawrence and her late husband Kenneth -- owned a home and a stable on three contiguous lots comprising ten acres of land in Grosse Ile, Michigan. During the discovery depositions, these lots were designated by number, for clarification, and were referred to as Lots 1, 2 and 3, respectively. Lot 1, on which the Lawrence's home was built, and Lot 2, as well, consisted of frontage along the adjacent roadway, while Lot 3 was situated to the back of the property and consisted of acreage behind Lot 2 that was not visible from the roadway. It was on Lot 3, situated at the back of the property, that Robert Hilger was injured.

Edith and Kenneth Lawrence kept two tractors in their stable on the premises. The tractors were used to cut the grass and weeds on

each of the three lots. The larger of the two tractors was used to cut Lots 2 and 3. A weed cutter, or "brush hog", was attached to the larger tractor, and the taller grass and weeds were cut with the "brush hog." Mrs. Lawrence testified that keeping the fields cut was quite a chore for her husband who, though he was retired, spent almost every night on the tractor.

Kenneth Lawrence passed away on March 4, 1993, and Mrs. Lawrence soon recognized that the property was simply too much for her to keep up and to maintain on her own. Thereafter, Mrs. Lawrence called upon Robert Hilger and his sons to do many things around the house for her, including mowing the fields. At one point in her testimony, she suggested that Mr. Hilger had simply volunteered his services in this regard. See p. A66, *infra*. That testimony gave rise to the sole issue upon which the trial court would ultimately grant summary disposition in favor of respondents, on the basis of the so-called "volunteer doctrine". Thus, in passing on the respondents' motion for summary disposition, the trial court ruled:

> ". . . I find that as a matter of law, that the Plaintiff is a volunteer. Under the doctrine, there is no duty other than to refrain from injuring the volunteer by willful or wanton misconduct. Therefore, there was not a duty owed here and no breach and summary disposition must be granted." (See p. A9, *infra*, 7/11/97 Hearing Transcript).

The trial court's written order granting the motion for summary disposition and dismissing petitioners' complaint was formally entered on July 24, 1997. Petitioners filed a motion for reconsideration on August 7, 1997 and that motion was denied by order of the trial court dated August 22, 1997. Petitioners then filed a claim of appeal on September 10, 1997. On appeal, the issue presented for review involved the sole question of the applicability, or

inapplicability, of the volunteer doctrine under the circumstances presented in this case, because that had been the only issue actually decided by the trial court in granting summary disposition.

While petitioners' appeal was pending, a separate panel of the Michigan Court of Appeals issued a published opinion in the case of *Ryder Truck Rental v. Urbane*, 228 Mich App 519 (1998). In that case, the Court held that the "volunteer doctrine" applied only to claims based upon a master's vicarious liability, in *respondeat superior*, for the acts of a servant. As a precedent binding upon all other panels of the Court of Appeals pursuant to Michigan Court Rule 7.215(H), it thus followed that the trial court's order granting summary disposition in favor of the respondents in the instant case would necessarily have to be reversed, based upon the trial court's erroneous application of the volunteer doctrine, since no claim of vicarious liability had ever been advanced by petitioners here.

Reversal was not to be, however, for although the Court of Appeals recognized its obligation to follow the decision in *Ryder Truck Rental*, and was thus bound to overturn the trial court's ruling which had dismissed the petitioners' complaint on the sole basis of the now repudiated "volunteer doctrine", the appellate court proceeded to address various other issues which the respondent had sought to interject on appeal, notwithstanding the objection posed by the petitioners who stated their reliance on the longstanding practice of the Court of Appeals to refrain from reaching novel issues which had not actually been decided by the trial court in the first instance, as petitioners' counsel expressly noted for the record, citing the following authorities:

"**This Court will not consider an issue which has not been decided by the trial court**". *Brewster v. Martin Marietta*, 107 Mich App 639, 646 (1981);

"We do not address defendant's remaining issues, which it

concedes are not at issue in this appeal. **Our review is limited to issues actually decided by the trial court."** *Mich. Mutual Ins. Co v. American Community Mutual Ins Co.*, 165 Mich App 269, 277 (1987); and

"While the parties have briefed a number of other issues on appeal, this is the **sole issue actually decided by the trial court**, and **so we limit our review to that issue.**" *Schubiner v. New England Ins. Co.*, 207 Mich App 330, 331 (1994).

It was only in the course of appellate oral arguments in this case that the Court of Appeals first expressed a desire to open the door to consideration of issues not previously decided by the trial court. At that same time, however, the Court of Appeals provided significant insight into the manner in which it would ultimately dispose of the case -- by weighing the record evidence and by making arbitrary findings of fact – when, in expressing regret over the fact that petitioners' legal position with respect to the "volunteer doctrine" had been vindicated by an intervening decision of a separate panel of the Court of Appeals, the panel in this case made it abundantly clear to all of those present in the courtroom that it viewed the record evidence presented here on behalf of the petitioners with doubting eyes. In the words of the Court, as transcribed directly from the hearing on oral arguments, set forth *infra,* at p. A12:

> "The reason being is because **I think it advances collusive lawsuits and that's precisely how I view this one,** and especially when I see the testimony a couple months later, there's the log and the defendant obligingly says, 'Yeah, that must be the log where my son-in-law,' and so on. **So these things are rather transparent**. But I think I was arguing a position on the side of the law that is lost, so --". (See pp. A11-A23, *infra*, for full transcript).

With the Court's statement during oral argument foreshadowing what was to come -- an adverse ruling, in the first instance, on issues which the appellate court alone, unbeknownst to the parties or their counsel, would ultimately deem to be dispositive -- it is appropriate next to undertake a closer examination of the record evidence pertaining to the two issues which actually did serve as the ultimate grounds of decision in this case, the very issues with respect to which the Court of Appeals proceeded to make findings of fact, and to selectively weigh the record evidence in a manner adverse to the petitioners. These are the issues of 1) causation, and of 2) the respondents' actual or constructive knowledge of a dangerous condition on the premises.

First, evidence as to the cause of the accident was presented by the direct testimony of the injured party, petitioner Robert Hilger himself. When Mr. Hilger was asked what had caused the tractor to tip and injure him, he specifically testified, "A log". See p. A45, *infra*. His testimony revealed that, on August 15, 1994, at approximately 12:30 p.m., Mr. Hilger arrived at respondents' premises to mow the field in Lot 3. After starting the tractor, with the "brush hog" weed cutter attached, Mr. Hilger entered Lot 3 and proceeded along the perimeter of the field. He made a complete rotation of the field and started on a second rotation. As he proceeded along on the second rotation, the right front tire of the tractor struck a log which had been concealed beneath the tall growth of the field. When the right front tire went over the log, the tractor tipped violently to one side and dislodged Hilger from his seated position. However, the tractor was prevented from rolling completely over by the large weed cutter it was pulling. As the tractor continued forward in a tilted position, Mr. Hilger's right leg was trapped by the brake bar while his left leg was thrown against the side of the tractor and pinned between the tractor and the ground as he was dragged along. The tractor continued in a forward motion for approximately 20 to 25 feet and then came to rest at the base of a tree. Hilger could not move and was

trapped on the tractor with his body hanging off the left side of the tractor, his leg crushed, and his foot caught under the brake pedals. He was ultimately rescued by a neighbor, who heard his cries for help and summoned emergency care. See pp. A38-A55, *infra*.

After Mr. Hilger was released from the hospital and had recovered as best he ever would from the permanent injury to his leg, he returned to the accident site in an effort to determine precisely how the accident happened. Hilger has acknowledged that, at the time of the accident, he did not see the object which upset the tractor on that fateful day in August, for it lay hidden in the growth of the field. But upon returning to the very location where the accident had occurred, Mr. Hilger in fact found the log, to the existence of which he positively testified at his deposition. The respondent acknowledged that she, too, had actually seen the log:

Q. You have seen the area where Robert hit the log?
A. Yes.
Q. Have you seen the log?
A. Yes.
Q. Is the log still there?
A. Yes.
Q. Has anyone moved it?
A. No. (See p. A74, *infra*).

The inference Mr. Hilger made -- that the log had caused the tractor to tip -- was shown to be the only reasonable inference supported by the facts and circumstances surrounding the accident. The record was devoid of any evidence to suggest, for example, that the tractor had been caused to tip by a mechanical or other defect, that Mr. Hilger was under the influence of alcohol, medication, or other controlled substance, or that he had otherwise suffered from any prior physical limitation which could have contributed to the accident. Nor was there any evidence to suggest that operator error caused the tractor to rear up violently, dislodging Mr. Hilger from the seated

position, and crushing his leg in the process. To the contrary, the record revealed that Mr. Hilger was operating the tractor in a safe and prudent manner, with eyes forward and both hands upon the wheel, traveling at a slow rate of speed with the tractor in first or second gear in order to make a clean cut. See pp. A40-41, A47-48, A55, *infra*.

Having been present on the day of the accident, and thus having perceived all of the events leading up to, and including, the actual accident sequence as it unfolded, Hilger's testimony identifying the cause of the accident was based upon his own personal knowledge and perception -- including his tactile feeling of the precise manner in which the tractor was caused to tip violently to one side by an object in its path which lay concealed from plain view beneath the tall grass on the defendant's premises – and, because he was present and had experienced the accident firsthand, Mr. Hilger also knew the precise location in the field where the object which had caused the tractor to tip would be found. Upon returning to that very location, after his release from the hospital, Mr. Hilger in fact found the log which he expressly identified as the cause of the accident. Nonetheless, the Court of Appeals in this case, in passing on a question not previously addressed by the trial court below, inexplicably ruled that Mr. Hilger "never identified what caused the tractor to tip", and purported to base this finding on the singular fact that Hilger "never saw the log on the day of the accident", to the exclusion of all other facts and evidence presented on the record before the Court. See pp. A26, A30-A55, and A56-A79, *infra*.

Additional evidence, which further supported Mr. Hilger's testimony as to the cause of the accident, served also to establish the respondents' knowledge of a dangerous condition on the premises. The proofs revealed that respondent had knowledge of the dangerous condition, as she testified she knew there was "wood piled everywhere", that there were also "tall weeds" as well as "high grass" in Lot 3, and that "there was something back there, there was junk piled back there . . . along the fence lines." See pp. A68-A78, *infra*.

Notwithstanding such knowledge, the respondent did not go out to Lot 3 to inspect the premises or to look around, nor did she make any effort to discover hidden defects such as the sizable log concealed in the tall grass and weeds which had caused the tractor to tip, seriously injuring the petitioner, Mr. Hilger. See p. A76, *infra*. Respondent testified that the last time she had even gone out to Lot 3 at all was "years ago". See pp. A71-A72, *infra*. In an effort to explain why she did not go out to Lot 3 to look around or to inspect the premises, Respondent testified that she really didn't want to, as the grass was high and she thought there may have been coyotes back there, yet, when asked if anything else had prevented her from going out to Lot 3, she acknowledged, "Nothing prevented me, but nothing made me want to go either." See p. A76, *infra*.

Once again, however, in ruling on a question not previously ruled upon by the trial court in the first instance, the Court of Appeals proceeded arbitrarily to find that respondent had no actual knowledge of a dangerous condition on the premises and, moreover, that respondent had no constructive knowledge because, the Court found, she "was in no position to know" if there was a dangerous condition on Lot 3. See p. A26, *infra*. The Court expressly based the latter finding on an inference it drew from the singular fact that respondent had apparently "relied upon plaintiff and his sons to take care of Lot #3 for her", see p. A26, *infra*, to the exclusion of all other facts and evidence presented on the record before the Court, which included the evidence that showed not only was the respondent "in a position to know" -- as the owner and occupant of the premises -- but, also, that she in fact knew of the wood piled everywhere, the tall grass and weeds, and the junk along the fence lines.

The federal question thus arose in this matter only after the Michigan Court of Appeals finally disposed of the petitioners' case in the manner described above, on grounds not previously ruled upon by the trial court in the first instance, and then proceeded to reject a motion for reconsideration in which the petitioners relied upon their

right to trial by jury under the law of the State, but were denied same, thus giving rise to a question concerning the deprivation of a protected liberty interest in violation of the Due Process Clause of the Fourteenth Amendment. No appeal as of right could be had from the Court of Appeals' decision, and petitioners therefore filed an application for leave to appeal to the Michigan Supreme Court arguing, *inter alia*, that "The summary judgment procedure cannot be utilized in such a manner as to impinge upon a party's right to due process, and to trial of disputed factual issues by a jury, as guaranteed under the provisions of both the State and Federal Constitutions". Petitioners cited the statements made during appellate oral arguments which reflected the Court of Appeals' expressed view of the petitioners' suit as "collusive", and its expressed view of the record evidence as "transparent", and petitioners also cited the manner in which the appellate court had proceeded improperly weigh the record evidence and to make arbitrary findings of fact based upon inferences selectively drawn from those portions of the record most favorable to the respondents' position, to the exclusion of other record evidence supporting the petitioners' claims. Petitioners' application for leave to appeal was initially denied by order of the Michigan Supreme Court on September 12, 2000. The federal Constitutional question was again presented to the Michigan Supreme Court, as the primary subject of the petitioners' motion for reconsideration, which was considered and rejected by order of the Michigan Supreme Court dated December 27, 2000.

REASONS FOR GRANTING THE WRIT

I. The manner in which the State appellate court disposed of petitioners' claims was violative of Due Process because that court disregarded well established common-law protections against arbitrary adjudication.

The question here presented calls for identification of the basic procedural requirements which must be observed – and, thus, the question of what process is due -- before a litigant in a State court civil action may be denied an established liberty interest in the right to trial by jury as at common law, once that right has first been expressly granted and preserved by the law of the State. It is important to note, at the outset, that petitioners do not assert, and the issue presented here does not involve the question of whether, the right to trial by jury in a State court is guaranteed by the Seventh Amendment of the United States Constitution. Nor do petitioners assert that the Due Process Clause of the Fourteenth Amendment is the source of their substantive right to trial by jury in the State Court. Indeed, petitioners' substantive right and entitlement to trial by jury, under the circumstances presented in this case, is one created by the express provisions of the Michigan Constitution (1963), Article 1, Section 14, which provides, in pertinent part, that "The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." Moreover, the Michigan courts have long acknowledged that, "Our Constitution, in retaining the right of trial by jury, tacitly refers to and adopts the common law number." *Hill v. People* 16 Mich 351, 355 (1868). In *Van Sickle v. Kellogg*, 19 Mich 49, 51 (1869), Mr. Justice Cooley spoke of this same clause as set forth, at that time, in Article 6, Section 27 of the Michigan Constitution, and noted:

> The constitutional principle which underlies the right is one to which the people governed by the common-law have clung with perhaps more tenacity than to any other; and they have justly regarded it as not preserving simply one form of investigating the facts in preference to another where both would have obtained the same result, but as securing a mode of trial which was best calculated to insure a just result,

> and to secure the citizens against the usurpation of authority, and against arbitrary and prejudiced action on the part of single individuals who chanced to be possessed of judicial power."

This Court, in *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990), has recognized that when state law creates a liberty interest in having a jury make particular findings, then " . . . speculative appellate findings will not suffice to protect that entitlement for due process purposes.", citing *Hicks v. Oklahoma*, 447 U.S. 343 (1980). What, then, are the constraints imposed by the Due Process Clause on judicial action when a State court is asked to rule summarily upon the evidence presented and the inferences urged by the parties in a case where the right to trial by jury exists under State law? More precisely, does the Fourteenth Amendment require that a State court refrain from making findings of fact, or from assessing the relative weight to be afforded competent evidence that is offered to establish a material fact in issue, and thus, does the Amendment serve to preclude a manner of proceeding by which the court arbitrarily undertakes to substitute its own opinion for that of the jury? Petitioners maintain that it does, for each of the reasons set forth herein.

The analysis begins by considering, first, the manner in which this Court has historically been guided in determining what process is subsumed within the Constitutional guaranty of Due Process. On this point, the observations of Mr. Justice Curtis in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272 (1855) ring as true today as ever before:

> But is it "due process of law"? The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power

> to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

That well established common-law procedures continue, to this day, to have a significant bearing on the question of what process is due in a particular case, is beyond doubt. This Court recently reaffirmed that proposition in the matter of *Honda Motor Co. v Oberg*, 512 U.S. 415 (1994), noting:

> Oregon's abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the due process clause. As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis. Because the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which

> a party has complained of their denial. In fact, most of our due process decisions involve arguments that traditional procedures provide too little protection and that additional safeguards are necessary to ensure compliance with the Constitution.
>
> Nevertheless, there are a handful of cases in which a party has been deprived of liberty or property without the safeguards of common-law procedure. When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process. *Honda Motor*, *supra*, at 430 (Citations omitted).

Honda Motor Co. involved an amendment to the Oregon Constitution which prohibited judicial review of the amount of punitive damages awarded by a jury. That provision of the Oregon Constitution was held to be violative of the Due Process Clause of the Fourteenth Amendment because of the deviation from traditional common-law protections which had long operated as a safeguard against arbitrary adjudication in the form of excessive jury verdicts. The instant case, in one important sense, involves the opposite side of the very same coin. Here, petitioners invoke the protections of Due Process and, thus, of well-established common-law protections, as a safeguard -- not against arbitrary adjudication from the jury box -- but as a safeguard against arbitrary adjudication from the bench, in the form of improper intrusions upon the traditional fact-finding province of the jury. The significance and substantial nature of the question presented in this matter is thus on par with that addressed by the Court in *Honda Motor*. As in *Honda Motor Co.*, this is one of only a "handful of cases in which a party has been deprived of liberty or property without the safeguards of common-law procedure", and it is a case in which "the absent procedures would have provided protection

against arbitrary and inaccurate adjudication. . .". *Honda Motor Co., supra*, at 430.

What, then, is the traditional procedure and established protection of the common law which has served, in words of Justice Cooley, to further the fundamental interest of all persons in "securing a mode of trial which was best calculated to insure a just result, and to secure the citizens against the usurpation of authority, and against arbitrary and prejudiced action on the part of single individuals who chanced to be possessed of judicial power"? Such protection, it is urged, is found in the basic constraint upon the province of the court, specifically, with respect to the fact-finding function which has traditionally been reserved to the jury at common law, and which has thus long served as a fundamental check on the unfettered will of the sovereign and its courts.

The roots of this common law tradition are long and deep, as evidenced by the words of Bacon who, in a proclamation for jurors issued in 1607 noted, "The law of this our realm leaveth . . . the discerning and credit of testimony wholly to the juries' consciences and understanding." See Spedding, *Letters and Life of Bacon*, iii, 390. Later, in commenting on the practice of punishing jurors whose findings were not in accordance with those which a court, or the Crown, would have made upon trial, it is noted by Hale in *R. v. Wagstaffe*, P.C. ii 312-313 (1665), that:

> "It was agreed by all the judges of England that this fine was not legally set upon the jury, for they are the judges of matters of fact, and although it was inserted in the fine, that it was *contra directionem curiae in materia legis*, this mended not the matter, for it was impossible any matter of law could come in question, till the matter of fact were settled and stated and agreed by the jury, and of such matter of fact they were the only competent judges."

In *Bushell's Case*, Vaughan's Rep. 135 (1670), which involved a legal challenge to the imprisonment of a juror who had participated in the acquittal of Quakers William Penn and William Meade on charges of trespass, contempts, and unlawful assemblies in Grace-Church-Street in London – the acquittal allegedly having been "against the direction of the Court in matter of law"– the court proceeded to grant a writ of *habeas corpus*, noting:

> If the meaning of these words, finding against the direction of the Court in matter of law, be, that if the Judge having heard the evidence given in Court (for he knows no other) shall tell the jury, upon this evidence, the law is for the plaintiff, or for the defendant, and you are under the pain of fine and imprisonment to find accordingly, then the jury ought of duty so to do; every man sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong, and therefore the tryals by them may be better abolish'd than continued; which were a strange new-found conclusion, after a tryal so celebrated for many hundreds of years.
>
> For if the Judge, from the evidence, shall by his own judgment first resolve upon any tryal what the fact is, and so knowing the fact, shall then resolve what the law is, and order the jury penally to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue tryals by them at all? ....
>
> And in these cases the jury, and not the Judge, resolve and find what the fact is. Therefore alwaies in discreet and lawful assistance of the jury, the Judge his direction is hypothetical, and upon supposition, and not positive, and upon coercion. *viz.* if you find the fact thus (leaving it to them what to

find) then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant. . . . .

That decantatum in our books, *ad quaestionem facti non respondent judices, ad quaestionem legis non respondent juratores*, literally taken is true: for if it be demanded, what is the fact? the Judge cannot answer it: if it be asked, what is the law in the case, the jury cannot answer it. *Bushell's Case*, Vaughan's Rep. 135, 143-149 (1670).

In *Rex v. Poole*, which is reported in the cases of the King's Bench, Hardwicke, C.J. noted:

It is of the greatest consequence to the law of England, and to the subject, that the powers of the judge and the jury be kept distinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England. *Rex v. Poole*, cas. t. Hardw. 23, 23, 28; Cunn. 11, 14, 16 (1770).

Blackstone, as well, spoke eloquently of the distinct functions and provinces of the judge and of the jury, at common law, as follows:

The impartial administration of justice, which secures both our persons and our property, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices of the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their

> ...rank and dignity. It is wisely ordered, therefore, that the principles and axioms of law . . . should be deposited in the breasts of judges . . . . But in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder.

These well established protections of the English common law have also been recognized and followed in America since its founding, and have thus served as a fundamental underpinning of the system of justice in this country. In *Livingston's Lessee v. Moore*, 32 U.S. 469, 517 (1833), this Court noted:

> Trial by jury, therefore, as one of the modes of trial known to the common law, is the probation of a matter of fact issue between parties, in a depending suit, before judgment; it is its probation, before that body, sometimes twelve in number, and in some actions more, to whom, according to the course of the law, the decision of facts belonged, before the constitution, in proceedings according to the course of the common law.

In *Hepburn v. Dubois*, 37 U.S. 345, 376 (1838), this Court described in greater detail some of the most basic and fundamental of those rules of the common law respecting the separate and distinct functions of the court and of the jury which have been carried forward, over the centuries, to occupy a place in our own jurisprudence, as follows:

> If this Court can comprehend what these rules are, or promulgate them in intelligible language, they are these: – That where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such fact; a jury may infer any fact from such evidence, which the law authorizes a court to infer on a demurrer to the evidence: after a verdict in favor of either party, on the evidence, he has a right to demand a court of error that they look to the evidence only, for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part, or the whole of his case. If, in its judgment, the appellate court shall hold that the evidence was competent, then they must found their judgment on all such facts as were legally inferrible therefrom, in the same manner, and with the same legal results, as if they had been found and definitely set out in a special verdict. So, on the other hand, the finding of the jury on the whole of the evidence in a cause, must be taken as negativing all facts which the party against whom their verdict is given, has attempted to infer from, or establish by the evidence.

From the foregoing, it is manifest that the historic common law distinction between the province of the court and that of the jury has long provided a fundamental procedural safeguard against arbitrary adjudication in cases where the right to trial by jury has been established by law, as it has been established in the instant case pursuant to the Michigan Constitution (1963), Art. I, Sec. 14. The traditional practice thus serves as a touchstone for constitutional analysis under the Due Process Clause, in accordance with the

previously referenced decision of this Court in *Honda Motor Co. v Oberg*, 512 U.S. 415 (1994).

A closer examination of the manner in which these basic protections of the common law have been contravened in the instant case, in violation of the petitioners' right to Due Process as guaranteed by the Fourteenth Amendment, shows that the Michigan Court of Appeals proceeded, notwithstanding competent record evidence to the contrary, to find as a matter of fact that petitioner Robert Hilger "never identified what caused the tractor to tip". See p. A26, *infra*. Significantly, the opinion of the Court reveals that its finding in this regard was based upon nothing other than an adverse inference drawn from its selective and arbitrary reliance on a single fact of record – that being the fact that petitioner "never saw the log on the day of the accident." See p. A26, *infra*. Yet a review of the full record demonstrates that the Court of Appeals either ignored, or improperly weighed and then discounted the evidentiary value of, other competent evidence based upon Mr. Hilger's own personal knowledge and perception of events which established 1) Hilger's presence during the accident, 2) Hilger's sensation of the manner in which the tractor was caused to tip violently to one side by an object in its path that was struck by the right front wheel of the tractor, 3) Hilger's return to the scene of the accident after being released from the hospital and his positive identification of the log which had been concealed beneath the tall grass and weeds, as corroborated by respondent own testimony that she too had seen the log which Mr. Hilger identified, 4) Hilger's operation of the tractor on the date of the accident in a safe and prudent manner with eyes forward and with both hands upon the wheel while driving slowly in order to make a good cut, and 5) the existence of wood piled everywhere and junk along the fence lines, amongst the tall weeds and high grass, with no evidence whatsoever to suggest any possible cause of the accident other than that expressly identified by Mr. Hilger. See pp. A24-A27, A30-A79, *infra*.

That the decision of the Court of Appeals with respect to the

issue of causation was indeed a finding of fact, based upon an inference arbitrarily drawn from only a portion of the record evidence -- as opposed to a ruling in point of law – is readily shown. It is demonstrated not only by the absence of any controlling legal authority cited by that Court for the proposition implicit in its decision -- i.e., the novel proposition that in order to properly identify the cause of an accident, one must necessarily see what caused it "on the day of the accident" – but it is demonstrated as well, and even more forcefully, by the longstanding decisions of the highest Court in the State of Michigan which have long recognized, to the contrary, that evidence tending to show that no person actually saw what caused an accident, either on the day of the accident or otherwise, is not alone dispositive with respect to the issue of causation. See, for example, *Kaminski v. Grand Trunk W R Co.*, 347 Mich 417 (1956), as cited in *Skinner v. Square D Co.*, 445 Mich 153, 168 (1994). For, in *Kaminski, supra*, even though the plaintiff had not actually seen what caused the accident, on the day of the accident or otherwise, he was properly permitted to present his case to the jury based solely on circumstantial evidence of causation.

By its reliance on evidence which, standing alone, is not dispositive as a matter of law in accordance with the controlling authorities handed down by the highest Court in the State of Michigan, the appellate Court in this case has merely cloaked with color of law that which, in reality, is no more than a subjective finding of fact based upon an inference adverse to the petitioners. In discounting Mr. Hilger's direct testimony as to the cause of the accident, simply because Hilger candidly acknowledged that he did not actually *see* the log on the day of the accident, the Court of Appeals arbitrarily seized upon an isolated portion of the record, to the exclusion of all other relevant facts and circumstances supporting a reasonable and permissible inference of causation, and has thus substituted its own judgment for that of the jury, thereby depriving Mr. Hilger of his cause of action, and of his right to trial by jury, in a manner wholly

inconsistent with those fundamental principles of the common law by which the province of the court and of the jury were recognized as distinct, and by which the ultimate determination of matters of fact was reserved for the jury alone.

In a like manner, the finding made by the Court of Appeals when it ruled, in the first instance, on the issue of the respondents' actual or constructive knowledge of a dangerous condition on the premises and, specifically, its finding that respondent Lawrence "was in no position to know" of a dangerous condition on Lot 3, is also shown to be contrary to the established common-law protections against arbitrary adjudication upon which petitioners here rely as establishing a violation of Due Process.

The record evidence reveals that respondent Edith Lawrence clearly did have knowledge of a dangerous condition on her property. She testified that she knew there was "wood piled everywhere" , that there were "tall weeds" as well as "high grass" in Lot 3, and that "there was something back there, there was junk piled back there . . . along the fence lines." See pp. A68-A78, *infra*. Notwithstanding such knowledge, she did not go out to Lot 3 to inspect the premises or to look around, nor did she make any effort whatsoever to discover hidden defects. See p. A76, *infra*.

It is significant to note, at this point, that the transcript of oral arguments before the Court of Appeals demonstrates an expression of that Court's strong desire to depart from established Michigan precedent by placing the burden and duty of inspection on the petitioner, Robert Hilger, see pp. A17-A23, *infra*, even though the well settled and longstanding law of the State would allow no such delegation of the duty owed by the respondent, as the owner and occupant of the premises. The rulings of the State's highest Court on this point have consistently been recognized by other panels of the Michigan Courts of Appeals, as was the case in *McCord v. U.S. Gypsum Co.*, 5 Mich App 126, 130 (1966), wherein the Court noted:

It is generally agreed that the obligation as to the condition of the premises is of such importance that it cannot be delegated. Prosser, Torts (2d ed., sec. 61, p. 404). If the owner cannot delegate the duty to keep the premises safe, can he delegate the duty to give notice of a dangerous condition? The Michigan Supreme Court stated:

> If the property owner knows or reasonably should know of a dangerous condition on his premises, he may become liable for injury resulting therefrom, and he may not delegate his responsibility to another and thus escape liability. *Bradley v. Burdick Hotel Co.*, 306 Mich 600, 604 (1943).

In the instant case, rather than expressly acknowledge a departure from established precedent that it was bound to follow, the Court of Appeals achieved a comparable result simply by virtue of the manner in which it arrived at its ultimate conclusion that respondent Lawrence, "was in no position to know of a dangerous condition on Lot #3" – i.e., the Court made a finding of fact based upon an inference drawn solely from the evidence that Ms. Lawrence had "relied upon plaintiff and his sons to take care of Lot #3 for her." See p. A26, *infra*. Thus, by permitting evidence of respondent's reliance on a third party to serve as the basis for its ultimate finding that she was "in no position to know of a dangerous condition", the Court of Appeals effectively departed, *sub silentio*, from the established principle that a premises owner may not delegate the legal duty which the law places on such person. Citing no legal authority for its conclusion on this issue, the Court of Appeals is again plainly shown to have ruled, not in point of law, but as a matter of fact, when it selectively seized upon a portion of the record evidence that was not dispositive nor even material, as a matter of law, to the issue of whether respondent had constructive knowledge and, thus, should have

known of a dangerous condition on the premises based upon the non-delegable duty imposed on her by the settled law of the State of Michigan.

In the course of the hearings below, respondent made every effort to shift all focus from the issues of constructive knowledge and her duty to inspect the premises, choosing instead to rely on the assertion that she had no actual knowledge of the particular log which injured the petitioner, and on the further assertion that the bulk of the "wood piled everywhere" and the "junk . . . along the fence lines", of which she was undoubtedly aware, was located in an area of Lot 3 other than the place where the specific log at issue here was found. However, while focusing on the purported absence of any *actual* knowledge of the *specific* log in question, or of the *specific* manner in which that log could cause an injury like that suffered by Mr. Hilger, the respondent ignored controlling Michigan authorities which have held that no such specific and detailed knowledge need be shown, as the test to determine whether a duty is owed under Michigan law is not dependent upon whether the defendant should have anticipated the particular act from which the injury resulted. *Schultz v. Consumers Power Co.* 443 Mich 445, 452 (1993).

> "A plaintiff need not establish that the mechanism of injury was foreseeable or anticipated in specific detail. It is only necessary that the evidence establishes that some injury to the plaintiff was foreseeable or to be anticipated." *Schultz, supra*, at 452, citing *Clumfoot v. St. Clair Tunnel Co.*, 221 Mich 113 (1922) and *LaPointe v. Chevrette*, 264 Mich 482 (1933).

The highest Court in the State has held that a failure to inspect, alone, can make it foreseeable that defects will not be discovered which could result in injury or death to persons, *Schultz, supra*, at 453, and it has held that the duty to inspect and repair

involves more than merely remedying defective conditions actually brought to the defendant's attention. *Schultz*, *supra*, at 454. Thus, the Court of Appeals' finding in this case -- as to the respondent's purported lack of *actual* knowledge -- is in no way material to the separate and distinct issue concerning her constructive knowledge. It has been shown, above, that in ruling on the latter issue and finding, as a matter of fact, that respondent "was in no position to know" of a dangerous condition notwithstanding the clear record evidence to the contrary, the Court of Appeals once again ventured improperly into the fact-finding province of the jury, selectively weighed the record evidence in a manner which contravened well established safeguards of the common law ,and thereby deprived petitioners of their protected liberty interest created by State law in the right to trial by jury in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For each of the reasons stated above, this petition for certiorari should be granted, so as to preserve the time-honored safeguards of well established common-law practice in accordance with the Due Process guaranty of the Fourteenth Amendment and, thus, "to secure all citizens against the usurpation of authority, and against arbitrary and prejudiced action on the part of single individuals who chanced to be possessed of judicial power."

Respectfully Submitted,

March 27, 2001

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
_____ Term, 2001

ROBERT G. HILGER and
GAY E. HILGER,

Petitioners

v.

EDITH M. LAWRENCE and the
EDITH M. LAWRENCE TRUST,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court, or alternatively, To The Michigan Court Of Appeals

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PETITIONERS' APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONERS, ROBERT AND GAY HILGER

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

ROBERT G. HILGER and
GAY E. HILGER,
Plaintiffs,

Wayne Circuit Court
v No.95-528053 NI

EDITH M LAWRENCE and
the EDITH M LAWRENCE TRUST,
Defendants.

TRANSCRIPT OF HEARING ON DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Friday, June 11, 1997

THE COURT: This is Hilger versus Lawrence.

MR. BRYANT: My name is Randall Bryant for the Defendant. It is my motion this morning.

MR. DETTMER: Dennis Dettmer, on behalf of the Plaintiff, Your Honor.

THE COURT: I don't want to shorten any of your argument, but this is the case where the Plaintiff was cutting a lawn at his mother-in-law's property. The tractor was more like a four wheeler than a tractor.

MR. DETTMER: Farm type.

THE COURT: Then he hits a log as part of the allegation and he sues the mother-in-law saying she had known about the log? Am I in the same ballpark? That recitation is correct?

MR. BRYANT: Sure. Your Honor, we filed two briefs, the original brief dealt with the standard invitee licensee arguments and I guess

they pretty much spelled out in our original brief. The Plaintiff responded to that brief and then we came upon a different argument. We filed a second amended brief with reference to volunteer position with reference to the Plaintiff. I think this is a classic volunteer type of case as I have indicated in our amended brief. In this situation, as you indicated, the Plaintiff is the son-in-law that went over to mow a back lot. There is ten acres in this place. Using a farm type tractor at one end of the back lot to mow weeds. Mother-in-law did not ask that he do this. That he came over to the house and as a matter of fact, she was not even home at the time that he came over to the house, got the tractor keys. Took the farm tractor out to the back lot, which was not even visible from the house and proceeded to mow with a large mower on the back of the tractor.

After he started his second round, he allegedly hit this log that was in the lot. He tipped the tractor and some how he became entangled in pedals with injuries to his knee. He alleges that our sixty eight year old mother-in-law was negligent in not advising him of the condition of the back lot, the condition of the log in the back lot. That if he had been advised of this that he would not have run into this log. However, he had mowed this lot for at least two years before this incident occurred. Not often, but once or twice per year for a couple of years. So, he actually had more knowledge with reference to the condition of the back lot than his sixty eight year old mother-in-law. She testified that she had never been back there. That she had no knowledge as to what took place on this back lot, and nothing to warn him about. She did not warn him, because she had no knowledge with reference to what was back there.

So, he had superior knowledge with reference to the condition of the property and this back lot. There was suppose to have been a diagram attached that I hope was attached to your copy showing the layout of actually three lots.

Anyway, this is what the condition was and it is our position that this is a classic volunteer type case where the son-in-law comes

over, gets the tractor and goes out and mows the lawn and has an injury.

I have indicated in my addendum to my original motion for summary disposition in this matter, the law with reference --

THE COURT: Are you saying -- I can only deal with the law today. Are you saying that thereby she owed him no duty?

MR. BRYANT: Correct. Correct and that is as indicated in my addendum with reference to the law as to volunteer. There is some original caselaw which is cited in my brief starting in 1937 through 1965 with reference to the volunteer doctrine. This has all been spelled out in my brief. I am not going to go over it for the Judge. I have, however --

THE COURT: Would you say that I don't get to send that to a jury, whether he is a volunteer or an invitee or a licensee, I don't get to send that?

MR. BRYANT: It's a matter of law as to the volunteer and as to the duty, that's a question of law. I have attached a couple of albeit, unpublished cases to my addendum which I admit is not precedent, on the record, however one of the cases, the 1993 case. The other case is a 1989 case, which deal with the volunteer doctrine. They cite the old cases in viewing the volunteer doctrine at the present time, as of 1993. As a matter of fact, the 1993 case also involves in-laws as Plaintiffs and Defendants. With reference to the volunteers, they find that there is no mutual benefit such as in cases that we have here where the son-in-law comes in. He volunteers this services and mows the lawn and does other things, but there is no mutual benefit. That this is the typical volunteer case.

THE COURT: He is a better son-in-law thereby.

MR. BRYANT: You betcha. If my son-in-law would do that, I would think he is a good guy, too. So, as I say, the law with reference to the volunteer is in my addendum, second brief that we have filed in this matter. It's my position that there was no mutual benefit. He is a true volunteer coming on to our lot. He had superior knowledge with

reference to the conditions of the lot number three that we keep referring to in the testimony which is the lot back behind the barn and not out near the road. That there was no mutual benefit and there was no duty owed to the son-in-law by the mother-in-law.

In the alternative, they argue that he is an invitee and I guess that even if you assume that, that my position is that he has superior knowledge as to the conditions of the back lot. The mother-in-law testifying that she never went back there. Her husband, who had since died, was the one that took care of the back lots of this ten acre plot that they have. That she had no knowledge with reference to the conditions. That this was something that her husband took care of. She never went back there and the son-in-law did go back there.

My position is that we have no violation of any duty owed to the Plaintiff under either position. That he is a volunteer or, as they say, as an invitee. In my original brief we concentrate on the licensee. I am not going to go into that. That is in my brief, but that is our position and we ask that the Court grant our motion for summary disposition.

THE COURT: Mr. Dettmer?

MR. DETTMER: Your Honor, there are some disputed facts and I don't concede that Mr. Bryant recites accurately each and every factor involved here.

But, I think that starting with the concept that an invitee is given certain protections by the duty created with the landowner. Ms. Lawrence, who owes this property on Grosse Ile had certain duties and one of them was to warn of hidden dangers and a second duty to render the property safe.

So, the fact that she may not have known, and I dispute that. But even for the purposes of this argument, giving that some credence, she still had an affirmative obligation that that she didn't meet.

Therefore, the lynchpin of this case turns on the duty that she was under. Whether she was required to meet the duty given an invitee, or the duty given a licensee or a trespasser. Initially that was

basically the argument. Obviously Mr. Hilger is not a trespasser, and I think the licensee definition, I think that's been basically recognized by counsel that that is not applicable here.

In his brief, I think it is at ten, he, on behalf of the Defendant defines a licensee as one who is expressly or implicitly permitted on the property of another, but who is there for a personal, unshared benefit and who's presence on the property is merely tolerated by the owner or possessor. Obviously that is not the circumstance.

To back up a little bit, Mrs. Lawrence's husband died in 1992, I believe. And, after that the property had to be adjusted in terms of it's controlling the growth of the weeds and the various lots on this property. The property is in excess of ten acres on Grosse Ile. There are three lots, the third lot was mowed maybe once a year and that was done with the large tractor and with the hedgehog which was used to cut the weeds. On that lot, there were apparently some wood piles that Edith Lawrence knew about. She did not tell her son-in-law about that.

The problem originally was that she obviously could not handle this situation. Initially she asked her grandchildren to cut the lawn and using the tractor, because they were teenagers. She asked her son-in-law, the Plaintiff, to attend the boys and in the process, he along with the young men, cut the lawn.

Later, because they got jobs he started to do that. This went on for a couple of years and it addressed the three separate parcels of property on her land. He did that for a couple of years. Did she receive a benefit?

Well, backing up. Now, is he an invitee under those circumstances? The law is very clear that there can be an implied invitee. I cited the *Leveque*, the *White* and the *Doran* cases that are very similar to this concept. This isn't a contractual arrangement. I impliedly ask someone to do something for me on my land and it is beneficial to me, and there may be a mutual benefit. That creates the status, the legal status of being an invitee.

Here, she invited him, not for social purposes like a licensee would be. She is not even there --

THE COURT: I know that. Choices are between volunteer and invitee.

MR. DETTMER: All right. Then, if I can address volunteer. That concept has been dealt with by the Supreme Court for about maybe forty or fifty years. It always arose prior to the two cases that Mr. Bryant has attached to his brief in the context of a master servant relationship. All the cases discuss a third party coming in and assisting an employee in trying to get a project done for some reason. They volunteer to do that. Something goes wrong, the employee injures this volunteer, question mark. The volunteer then sues the employer under a respondeat superior concept. The case authority says that under those circumstances the third party is merely a volunteer and the master has no obligation under master servant concepts.

Even in the case -- no, what has happened in these, I think clearly, these two cases, unfortunately are not reported and there are not an obligation that this Court has to follow. In those cases that concept of an invitee has been switched to premise liability concept as an aspect. Previously, any claim of liability, the duty was under a question of whether the person was a trespasser. Whether he was a licensee or an invitee. That is how duty was measured.

These two cases suggests now that in additional aspect should be added, whether the person is an invitee. But, even under that concept, and my position is that cannot be applied here because it is not the basis, the reasoning of the Supreme Court previously in applying an invitee. But, in the *Smith* v. *Verdlanger* (ph) case, the first one, I think, that Mr. Bryant attached. At page three, about mid page; the question presented to us is whether the opening statement presented facts, which, if supported by the evidence and believed would show that Plaintiffs were not merely volunteers, but responded to an invitation to perform a task and had an interest in the work to be done.

So, even the difference in the line of cases on invitation and invitees dealt with the fact that the third party that came in had absolutely no interest. Here, as with an invitee, Hilger had some interest. His mother-in-law did do things for him. It wasn't a one way street. He didn't just gratuitously do this. She, for example, watched his step-child, a young child when he and his wife were off and she would do that on occasion.

The cases that I cite, *Leveque, White* and *Doran* all deal with similar circumstances to that. For example, the mutuality issue in the *White* case, Your Honor, at page 436 in the decision at 200 Michigan Appeal. The Court indicated; the deposition supports a reasonable inference that, rather than a social visit, the Plaintiff's presence on Defendant's property was part of a mutual beneficial, albeit informal, exchange of services. Now, in this case all that was involved was mutual babysitting, but not unlike our circumstance. There were benefits provided to my client by Mrs. Lawrence as well as the benefit he supplied to her on a regular basis, a substantial benefit, of taking care of her home. Mowing the lawn. Mowing the back lots and generally maintaining it for her under those circumstances.

In light of those standards, he is an invitee. Now, the cases also recognize that there can be a dispute about that that falls within a factual area that are not subject to a strict ruling as a matter of law. That, again, is in the *Doran* case and also in the *Leveque* case.

So, under the circumstances here, there is a issue of whether he is an invitee, but under that standard, he should given the opportunity of his day in Court, Your Honor.

MR. BRYANT: Just briefly, Your Honor. I know that we are using up our time quickly here.

I think that the Hilger interest that he talks about here, I think this is all a family relationship. We have the same relationship in our family and I think that's the family relationship that they have. It's not an interest that he is looking for, that she is looking for in the whole situation.

With reference to wood piles. He talked about wood piles. He didn't even hit a wood pile, so any knowledge that Lawrence had about wood piles is immaterial, because he didn't hit a wood pile and he knew of the wood piles anyway.

Implied invitee, I think that is a family relationship. Every son-in-law is an implied invitee to the mother-in-law's house, I would think. The father-in-law's house. Again, the duty that he talks about with reference to the sixty eight year old mother-in-law with reference to warning of danger. She wasn't aware of what was going on in this far back lot --

THE COURT: I guess, more troubling, if I take Defendant's side, more troubling -- won't I be fostering a policy that says, never volunteer. Never do anything nice?

MR. BRYANT: I don't know. I don't think so. People do this all the time. What you maybe doing -- let's say, okay, if you are going to volunteer and help your mother-in-law out, --

THE COURT: I don't think helping your mother-in-law was necessarily voluntary, but go on. It is de rigueur, if we can use the French.

MR. BRYANT: I see what you are saying, but I don't think so, because I think that if you are going to volunteer, you have got to look out for yourself and not blame your mother-in-law or whoever you are volunteering for assistance for your own actions. Like what has happened in this situation. It's been his own actions. Nobody was there –

THE COURT: Mr. Dettmer, that does bring me to a -- you are saying that this, you know, not elderly, but old woman has to go out and before he cuts the grass, even if she knows that he is going to do it, she has to go out and examine the premises so that she can warn him. That is a duty. That's what you are saying?

MR. DETTMER: Right. The duty could be just, I know that there are logs back there, and she did know that. That is not really a --

THE COURT: But, the next case -- wouldn't the next case be, and if he still goes out, you should have removed them?
MR. DETTMER: Well, she has a duty to make the premises safe. There is no doubt about that. She is the landowner. I don't think there are separate levels of duty depending on age, necessarily. You hire somebody to come on your property and you have a hidden danger, you have some obligations that, as between the two competing parties, who is the innocent person?
THE COURT: No question. That always heavily in my decisions on these cases. Well --
MR. BRYANT: I think in this situation, the Plaintiff had the superior knowledge, because he had been back there, Mrs. Lawrence testified that she didn't go back there.
THE COURT: That might be a question of fact, however, based on the testimony. But, in any event, I would hold that the invitee is owed a duty by the landlord to warn of hidden hazards. But in this case I find that as a matter of law, that the Plaintiff is a volunteer. Under the doctrine, there is no duty other than to refrain from injuring the volunteer by willful or wanton misconduct. Therefore, there was not a duty owed here and no breach and summary disposition must be granted.
MR. DETTMER: Is the Court going to enter that on the --
THE COURT: No. He prevailed. Let him present an order, because if it is going to appeal it needs to be formal. Thank you.
MR. BRYANT: Thank you, Judge.
MR. DETTMER: Thank you, Your Honor.

(matter concluded)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

ROBERT G. HILGER and
GAY E. HILGER, Plaintiffs,

v.

EDITH M LAWRENCE and
the EDITH M LAWRENCE TRUST,
Defendants.

Wayne Circuit Court
No.95-528053 NI

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION AND DISMISSING PLAINTIFFS' COMPLAINT

At a session of said Court held in the City of Detroit, county of Wayne, State of Michigan on July 24, 1997

PRESENT: Hon. MICHAEL J. CALLAHAN

Defendants having made a motion for summary disposition, briefs and supplemental briefs having been filed by both parties, oral arguments having been made in open Court on July 11, 1997, and the Court being fully advised;

IT IS HEREBY ORDERED that the Defendants' Motion for Summary Disposition is hereby granted.

IT IS HEREBY FURTHER ORDERED that the Plaintiffs' Complaint be and the same hereby is dismissed, with prejudice and without costs to any of the parties hereto.

July 24, 1997

/s/
MICHAEL J. CALLAHAN
CIRCUIT COURT JUDGE

(Motion for Reconsideration denied on August 22, 1997)

STATE OF MICHIGAN
IN THE COURT OF APPEALS

ROBERT G. HILGER and GAY E. HILGER,
Plaintiffs- Appellants,

v

EDITH M LAWRENCE and
the EDITH M LAWRENCE TRUST,
Defendants- Appellees.

Court of Appeals
No.206103
Wayne Circuit Court
LC No.95-528053 NI

TRANSCRIPT OF ORAL ARGUMENTS ON APPEAL,
HEARING HELD ON JUNE 9, 1999
Audio Tape Transcription

THE CLERK: Hilger versus Lawrence.
MR . DETTMER: If it please the Court, Dennis Dettmer appearing on behalf of the plaintiffs-appellants and Gary Hermanson, my associate, is here with me. Mr. Updike?
MR . UPDIKE: Michael Updike for the Defendant.
MR . DETTMER: We no longer have the volunteer doctrine, do we? I 'm going to be brief, to the point then. Recognizing that, as you know, on July 24th, 1997 Judge Callahan granted summary disposition on plaintiff's premise liability case based solely on the volunteer doctrine. The Ryder case that you're familiar with, Judge Saad, has vacated that position in this circumstance. Mr. Updike was professionally, appropriately and competently brings that to the Court's attention, brings to the Court's attention under MCR 7.215 that the panel must follow the Ryder case. He also presents, though, some other issues secondary to the decision of Judge Callahan were not addressed at all by Judge Callahan and, as the Court knows, under the *Brewster versus Martin-Marietta* standard, which is at 107 Mich.

Appeals 639 at 646 and other decisions, in the absence of an issue being addressed by the trial judge this isn't the forum for review. This is not a court that makes decisions, in the first instance, you review in this instance Judge Callahan's decision. And so I will be very brief, though, I would like to reserve argument if necessary. This case needs to be reversed, I think Mr. Up dike recognizes that, and I'd ask the panel do it. Thank you.

THE COURT: Thank you.

MR. UPDIKE: Good afternoon, your Honor. May it please the Court, Michael Updike appearing on behalf of the defendants-appellees here. This is the third case I've had where my horse has been shot out from under me. I'm -

THE COURT: (Interposing) On the way back to the corral or–

MR. UPDIKE: Yes. I'm not exactly sure why I have been so honored, but I sort of feel like Adlai Stevenson when he compared losing the presidency to being tarred and feathered; it was not that good except for the honor of it. However, I do think what is important here are two things. First of all, I know, Judge Saad, that you have expressed some displeasure, I guess, or disagreement with the *Ryder Truck* panel in *James v. Alberts* case.

THE COURT: The reason being is because I think it advances collusive lawsuits and that's precisely how I view this one, and especially when I see the testimony a couple months later, there's the log and the defendant obligingly says, "Yeah, that must be the log where my son-in-law, " and so on. So these things are rather transparent. But I think I was arguing a position on the side of law that is lost, so --

MR. UP DIKE: And I certainly would never suggest that the panel violate its oath or anything like that.

THE COURT: Right.

MR. UPKIKE: I'm just suggesting that you do have a certain power under 7.215 to suggest your disagreement and to request a special panel and, perhaps, we can take it from there. But the other thing I

want to address here is that what I think is particularly important is the time we moved for summary disposition, the volunteer doctrine was not even on our minds. Maybe it should have been since it wasn't a law at the time, but these things happen. And, anyway, when the plaintiff's response to our motion for summary disposition came in, I suddenly woke up to the volunteer doctrine, and that's when we briefed it. And I think the point of the matter is, is that we presented three separate arguments to Judge Callahan as to why we were entitled to summary disposition quite apart from the volunteer doctrine.

THE COURT: He just chose the one, though, didn't he?

MR. UPDIKE: That is correct, your Honor. However, the way I read cases like the --

THE COURT: (Interposing) We can uphold him.

MR. UP DIKE: Exactly.

THE COURT: If it was the wrong reason, but the right result, we can uphold him.

MR. UPDIKE: That's exactly right, your Honor.

THE COURT: But I think what I must have did was suggesting perhaps there wasn't sufficient argument on those other issues, I don't know. Perhaps because Judge Callahan, I think, rightly ruled for the right reasons, although has been wrong.

MR. UPDIKE: I think the important thing is, your Honor, is that the issues were briefed before the court below. The record was made so-- (inaudible)

THE COURT: Sure of the arguments, then.

MR. UPDIKE: Exactly. The deposition – he certainly did hear the arguments, and I know Judge Callahan not that well, but I think from my experience with the man is, with the Judge, is that he certainly would read everything beforehand. The fact that he focused on one thing which was probably the most direct application, also that's sort of typical for him. Not --

THE COURT: (Interposing) Why don't you assume if he preserves it, maybe what you think – (inaudible)

MR. UPDIKE: Yes, your Honor. Well, we've been here a long time and I know we would all like to go home probably, so I'll be very brief. I would really like to primarily rely on our brief on this because I think I addressed the three issues that I see.

(Tape continued to Side 2.)

MR. UPDIKE: - - off. Because there was no mutual benefit, and I know that the plaintiff alleges, "Well, I was being a good son, there is this implied benefit that I would get from my mother--"

THE COURT: She baby-sat for us.

MR. UPDIKE: --and so forth, you know, et cetera. But if you do that, then you essentially eliminate the long-held principle that a social guest is a licensee and not an invitee. And the cases where there have been a finding of a question of fact as to whether a person's an invitee or licensee is where there's a specific request and that specific request has been honored. That is, would you baby-sit my children; yes, I will. We don't have that here. We have very clear testimony from the plaintiff that he simply did this as a gesture, and we should admire him for that. I mean, I think that's very commendable. But we also have testimony for--from the defendant that, no, I never made a request; in fact, I normally- -if I couldn't physically do something because of my age and infirmity, I would really prefer to hire people to do it for me. But if somebody, one of my relatives would do it for me, then I would do it.

THE COURT: Let's assume you lose on that issue; what's your next one?

MR. UPDIKE: The next issue is, okay, fine, he's an invitee, because then we run out of options. He's got to be an invitee if he's not a licensee. Obviously he wasn't a trespasser, and the volunteer doctrine is dead. If he's an invitee, I agree we have the highest duty of care to him that we can have. But it's still a reasonable duty of care. It's not--we're not insurers of his safety. And so here we have a situation where we are supposed to go out and- -I mean to try and avoid this accident, what he would have had to have done would have been to go

out to this field number three which can't be seen from the house and do a survey of the field to make sure there were no hazards. And I submit to you that that is-

THE COURT: (Interposing) Didn't the defendant indicate that the field was full of logs and that the grass had grown over them and he couldn't see them?

MR. UPDIKE: The way I read the testimony, your Honor, is that she said what happened was her late husband had occasionally taken logs and so forth to field number three, but that he placed them along the eastern fence line. This accident happened in the southwest corner of the field, so there was no reason for her to believe that this log would be there and she has– So what I'm saying here is that, as a matter of law, she did not have--this was not--it was not reasonable for her to be required to go out there and search the field to see if there was some hazard when-

THE COURT: (Interposing) Let me turn the argument around a little bit. I am somewhat of the view, until I'm persuaded otherwise by brother counsel, that it was the gentleman who was taking care of the property. It was his obligation to search and find out the logs, not hers. If indeed he's done this two, three, four times before, and I think there's record evidence and a rather huge piece of property, it would seem to me that he would be the one who would be looking, searching, and shearing, 'cause we've all done this sort of job before. And to think that the woman who has just given over the responsibility to her son-in-law to do the job would be the one out there checking for logs when he's the one taking care of the property, turns the tables on whose duty it is to search the logs. Do you understand my–

MR. UP DIKE: Your Honor, I--I agree where--I understand your position exactly, and that's what I was trying in my feeble way to articulate, is that that's exactly the position I was trying to take here.

THE COURT: If he's not a volunteer, if he is somebody who's agreed to do this for his mother-in-law, which is a very generous and gracious thing to do, but to take care of a property of that dimension, I know

exactly what kind of dimensions you're talking about, and a tractor, and I've been on a tractor doing this very same thing, it's the person who is on the tractor who is always looking for these things and, indeed, might warn the mother-in-law. If you're going to go out there with somebody, realize there are logs allover this place, because he's the one doing the job, not her. That's why he's doing it as opposed to her. So I don't quite understand, and perhaps Mr. Dettmer can explain it, why it's her duty to find and warn about logs when, in fact, he's assumed the obligation of taking care of the property.

MR. UPDIKE: I agree, your Honor, and I think that addresses my second argument. My third argument is very short, and then I'll thank you for the time. The third argument is, basically, *Stefan v. White*, because we really don't know how this accident happened. Is it the plaintiff--the plaintiff, if you take the plaintiffs' testimony, word, and I do, is that he's driving this tractor along, it rears up for reasons unknown, he's thrown not off the tractor but he's thrown off balance on the tractor, and before he can get back and get control of the vehicle it runs into a tree and injures him. And but the problem is that nobody did any investigation at the time. Nobody knows exactly what caused the accident. There was no expert testimony that, well, it had to have hit something, or something like that. When they found the log some several months later, I don't believe there was any investigation to see if there was any marks, you know, like a tractor mark on the log.

THE COURT: How much time transpired between the accident and the plaintiff coming back and looking and saying, "A-ha, there is a reason"?

MR. UPDIKE: It was several mont .

THE COURT: Do we know specific, is there record evidence on that?

MR. UPDIKE: It was a year or less, but it was several months.

THE COURT: Perhaps-

MR. UPDIKE: (Interposing) I would defer to brother counsel on that.

THE COURT: Okay. I understand the speculation nature of that argument.

MR. UPDIKE: Exactly. And I think that's the thing is that – And just one final point, then I'm done – is that the plaintiff testified that he had mowed this field two or three times before and he had never, never saw the log, didn't have trouble with the log, and that he thought if it had been there he would have seen it and he would have dealt with it. Well, the other argument to that is, so that means if the log was suddenly placed there between his last cutting and the cutting where he had his accident, couldn't it have been placed there after his accident? That's my argument, your Honor. Thank you for your time.
THE COURT: Thank you.
MR. DETTMER: I should touch on one thing that Judge Callahan mentioned in our appendix at Exhibit 4, is the opinion of Judge Callahan, and at Page 14 --
THE COURT: (Interposing) I'm sorry, what was the appendix number on that one?
MR. DETTMER: Exhibit 4.
THE COURT: Exhibit 4?
MR. DETTMER: Yeah. In his opinion Judge Callahan indicates talking about question of knowledge in terms of the field, and Judge Callahan says at Line 5, "That might be a question of fact. However, based on the testimony – but in the event, but in any event, I would hold that an invitee is owed a duty by the landlord to warn of hidden hazards." And then he goes on, "But in this case I find that as a matter of law that the plaintiff is a volunteer," and then decides the case based on that as a matter of law, but we've already had arguments related to the other issues and he recognizes there's a fact issue there.
THE COURT: Judge Callahan was right on that point.
MR. DETTMER: At least he turned on it.
THE COURT: But what of the argument, Counsel, because it concerns me a little bit. If somebody is the caretaker, and let's, for lack of a better term, let's just assume that a good intention son-in-law, you and I might do the same thing. Our mother-in-law's without spouse and we're going to be the caretaker for the property, and as the

caretaker we're the ones who are doing the mowing and cleaning up to make sure that nobody's injured. Now, if we're injured can we then say that the mother-in-law is the one who should have been out back in the 40 acres searching for the logs when it's indeed the son-in-law who she believes is doing the very thing that you're now claiming she should have done. You see the problem?

MR. DETTMER: I understand the point, Judge.

THE COURT: Maybe logic ought not to come into play where we are talking about the law, but it does.

MR. DETTMER: It puts in perspective the problem. Mrs. Lawrence's husband passed away a couple years before. He had previously handled all the cutting, taking care of the field. There basically were three fields; one related to the house, the second was along the roadway, and a third in the back, a larger field of the three. But that field was allowed to grow because it wasn't the house, it wasn't along the road, and that was only cut once a year. Now, yes, Mr. Hilger had cut that after the passing of Mr. Lawrence, and I think it had been once or--two or three times, but only once a year.

THE COURT: Okay.

MR. DETTMER: So this was either the second time he did it or the third time he did it. So, therefore, did he have knowledge of the condition? No . Mrs. Lawrence, in her testimony, acknowledged that she was aware that there were wood piles back there. There's been no record evidence that Mr. Hilger was aware of that fact. And after the accident when Mr. Hilger was at the hospital, there is testimony by Mrs. Lawrence that she's talking to her daughter, who is at the hospital, and she's on the way back, I think she may have been out of the city, and there is a discussion at that point that Mr. Hilger ran over a hidden log that was in the grass. It was sometime later, yes, that they went out and looked for it, because he was hospitalized for a substantial period of time.

THE COURT: How much later that was, Counsel? Roughly? (Inaudible) Evidence.

MR. DETTMER: I'm not sure. It wasn't asked of him.
THE COURT: Okay.
MR. DETTMER: That I recall. But it was asked generally. There was testimony by Mrs. Lawrence that, yes, she went out to the field and they did look at it and that was the case. But understand there's no question that this tractor flipped halfway over. I mean something caused that that was in the grass. And this grass had not been cut that spring or that summer. This is like on August 15th, at the end of summer, so the grass was substantially high.
THE COURT: And this is a portion of the property that the plaintiff had cut before?
MR. DETTMER: Once or twice a year before and maybe two years before.
THE COURT: And heavily wooded?
MR. DETTMER: I wouldn't say it was heavily wooded. There were trees around the perimeter. Apparently, there was a fence line and the total acreage was like ten acres, but that also consisted of a house and the acreage, and the property involved in that and the property that was along the street line.
THE COURT: Any wetlands, marsh area?
MR. DETTMER: I don't think so. I mean, I think we provided some pictures and you'll see it's pretty--the grass had grown fairly high, but there were trees and bush along, and apparently this log was along the edge, between those lines, and the front wheel caught it and flipped it over and the hedgehog in the back kept it from going all the way over.
THE COURT: Right.
MR. DETTMER: And it turned on its way until it ran into something.
THE COURT: And the two or three times that he had done this before, is there any evidence that the plaintiff had, in fact, removed logs as part of cleaning up the property?
MR. DETTMER: No evidence of that one way or another, that I am aware of. He was not asked that, to my recollection, and I don't want to make a representation, but I have no recollection of that being

asked. But the real point, Judge Saad, is the question of where does the duty reside.

THE COURT: Right.

MR. DETTMER: And once you get to the point that Mr. Hilger is an invitee, it then is the obligation of Mrs. Lawrence as the property owner. You can't shift it to Mr. Hilger.

THE COURT: But the question what if the invitee and the caretaker are one in the same? What if the mother-in-law asks you to do this and you're doing the very same thing two, three, four years in a row; she's anticipating that you will take care of these things and then you say, "By the way, it was your duty to warn me, even though I'm the only one out in the back 40." You see what I'm saying?

MR. DETTMER: I understand. But if I may, I'm going to rely on the law, and I say that respectfully.

THE COURT: Okay.

MR. DETTMER: The point is that the burden is on her, the duty is on her. She owns it, he doesn't. That doesn't mean--he's out there once a year in that back acreage doing what he did as a favor to her, and she receives the sole consideration for that. I mean he spends hours on the tractor, and she would have had to pay somebody else. So is he an invitee? I mean once you get to that question, in looking at *Leveque* (ph) and the other cases we cited, the question is, if he's on the owner's premises, actually it's her trust, to perform services beneficial to her, and I'm looking at the case.

THE COURT: Right.

MR. DETTMER: That that person is an invitee. And once you get there, then the question is what is the owner's duty under those circumstances. Otherwise, you have to ignore all the premises liability law.

THE COURT: No, I understand what you're saying, and forgive me for letting logic and common sense get involved with invitee/licensee law, but you see what I'm getting at is if your caretaker, be that your brother, your sister-in-law, your brother-in-law, whoever, is the one

with whom you entrust to take care of these things and look out for these things, and indeed this is the person who is going to be warning you, as a matter of fact, if it is reasonable under the circumstances that the person within their duties as the caretaker is the one who's supposed to be looking for this, then how can we say because one is an invitee the landlord who we all know is not going to be the one out there in the back 40 looking for these things has a duty to warn? It just seems to invite an incongruous result.

MR. DETTMER: But, your Honor, this is still her house. This is where she resides year round, and it's not Mr. Hilger's home.

THE COURT: What would you say, however, if the testimony--let's assume this was the testimony-- she never goes out to the back 40, (inaudible) her house. She never goes out there, and the person who is doing it, we will say it's not this individual, but we are making law for the entire state--let's assume that that person testified he was the caretaker, he took care of the premises and she never went out there and he knew that. What do you do then?

MR. DETTMER: Well - -

THE COURT: Although she is still the owner, he's still invitee, what do you do?

MR. DETTMER: Well, if it isn't a workers' comp case.

THE COURT: Right, if it's independent contractor. This is issue, the son-in-law and (inaudible) and you're doing it.

MR. DETTMER: Okay, all right. I guess the point factually here that we're dealing with -

THE COURT: (Interposing) Stick with my hypothetical for a minute because I'm worried about where the law goes if we rule this way.

MR. DETTMER: Okay. But, your Honor, you'll be following precedents. If you go otherwise you're going to set new law which would, I think, upset some juris of premises liability law which you're suggesting here.

THE COURT: I'm not suggesting anything lightly about going that way, trust me. It's just a mingling problem here, and ruling the way

that I think we have to rule in your favor, but there's that problem.
MR. DETTMER: Well, I want to first of all assure you there's been no collusion or anything else.
THE COURT: Not suggesting (inaudible) . I understand.
MR. DETTMER: Nor arranged testimony here.
THE COURT: I understand.
MR. DETTMER: Okay. In the context of what you're asking me, the fact that I go out once a year and mow my former mother-in-law's property and she doesn't tell me that my deceased father-in-law had parked or stored cut logs, had them distributed along fence lines, and apparently dropped occasionally here and there a large log in that field, and I missed them 'cause I'm riding around, and this is unfortunately-
THE COURT: (Interposing) You were lucky the first couple times.
MR. DETTMER: At first, because it was at a point, this was an outer cut where the tree line was and the brush lines were so you happen to catch one just at that edge of the year before, and maybe the year before that he wasn't close to that so he didn't run into it. But she was aware and did testify the fact that her husband took logs and put them in the back acreage and there were piles back there. He obviously dropped one some years before while he was still alive and it was not discovered. Now, as between the two parties, Mrs. Lawrence I'm sure is a very nice person, she's older, but she was aware and she testified to that fact that, "Yes, there were log piles out there that my husband had put together."
THE COURT: I understand.
MR. DETTMER: Mr. Hilger is an innocent party. I mean, he might have been, maybe could have known, should have known, but the law doesn't say that. It might have been nice had he--I--believe me, he is crippled and will be the rest of his life, and he'd be very happy if he was aware of it and the accident didn't happen.
THE COURT: I think that's- -
MR. DETTMER: But that's not the case.

THE COURT: I think that's a very good response. To the point that was (inaudible.) Thank you.
MR. DETTMER: Thank you, your Honor.
MR. UPDIKE: Thank you so much.

End of Oral Argument Transcript

STATE OF MICHIGAN
IN THE COURT OF APPEALS

ROBERT G. HILGER and GAY E. HILGER,	
Plaintiffs- Appellants,	UNPUBLISHED
	September 7, 1999
v	No.206103
	Wayne Circuit Court
EDITH M LAWRENCE and	LC No.95-528053 NI
the EDITH M LAWRENCE TRUST,	
Defendants- Appellees.	

Before: Zahra, P.J., and Saad and Collins, JJ .
PER CURIAM

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm. We review a trial court's decision to grant or deny a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Plaintiffs argue that the trial court erred in granting defendants' motion for summary disposition pursuant to the volunteer doctrine. In *Ryder Truck Rental v Urbane*, 228 Mich App 519, 522; 579 NW2d 425 (1998), this Court ruled that the volunteer doctrine is restricted solely to actions involving respondeat superior liability and thus, the volunteer doctrine is not applicable premises liability actions.[1] We are bound by the precedent set in *Ryder*, *supra* pursuant

1 In *Ryder Truck Rental v Urbane*, 228 Mich App 519, 526-533; 579NW2d 425 (1998), Justice Corrigan, then Chief Judge of this Court, wrote a concurring opinion rejecting the majority view that the volunteer doctrine is restricted to actions involving respondeat superior liability. Justice Corrigan explained that the volunteer doctrine should turn upon whether the putative master extended to the putative volunteer an invitation to act. If the plaintiff's conduct is in response to an

to MCR 7.215(H). Therefore, we conclude that the trial court erred in finding that the volunteer doctrine was applicable in this case.

Nonetheless, we conclude that the trial court properly granted summary disposition to defendants because plaintiffs failed to present evidence to sustain a prima facie case of premises liability.[2] Assuming plaintiff Robert Hilger was an invitee, plaintiff would have to present evidence of a dangerous condition on the land that the defendant knew or should have known that plaintiff would not discover, realize, or protect himself against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). The mere occurrence of an accident is not enough to raise a legitimate inference of negligence. *Stefan v White*, 76 Mich App 654, 661; 257 NW2d 206(1977). There must be proof that a dangerous condition existed and defendant knew or should have known of its existence. *Bertrand*, supra at 609.

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invitation to act, then the volunteer doctrine does not apply. As Justice Corrigan explained:

> "The volunteer doctrine. . . is founded on the notion that no duty of ordinary care arises between a master and a volunteer because the master never agreed to enter into something akin to an employment relationship with the volunteer, *i.e.*, the master did not invite the volunteer to act. When the master invites the volunteer to act, whether gratuitously or not, application of the volunteer doctrine would not further this underlying rationale. *Ryder*, *supra* at 532-533, n2.

We agree with the well reasoned opinion of Justice Corrigan. We would declare a conflict with *Ryder*, *supra*, pursuant to MCR 7.215 (H)(3) but for the fact that Ryder is not determinative of the outcome in this case.

2 We find no merit in plaintiffs' argument that this Court should not consider whether there was sufficient evidence to establish a prima facie case of premises liability. Even though the trial court did not specifically rule on this issue and decided the motion on an alternative theory of law, this issue was briefed and argued before the trial court. Since we review motions for summary disposition de novo, it is well within this Court's authority to find that the trial court reached the right result for a different reason.

Plaintiff Robert Hilger testified that while he was mowing the weeds in Lot #3 of defendant's property, the tractor tipped to the left which caused him to fall partially off the tractor sustaining injuries to his left knee. Hilger never identified what caused the tractor to tip. Several months after the accident Hilger went back to Lot #3 and discovered a log that appeared to have been cut down lying in the area where the accident occurred.[3] Plaintiff never saw the log on the day of the accident, nor was there any other evidence or testimony to establish that the log plaintiff observed months after the fact was, in fact, what caused the tractor to tip to the left. Significantly, Hilger testified that he had mowed Lot #3 two or three times between 1992 and 1994 after defendant's husband died and never observed the log previously.[4] Additionally, defendant was in no position to know if there was a dangerous condition on Lot #3 because she relied upon plaintiff and his sons to take care of Lot #3 for her. Although defendant testified that she knew her husband had placed wood at the rear of Lot #3 while he was alive, the accident occurred in a different area of the lot more than three years after plaintiff began mowing the property. Thus, defendant's purported knowledge of the dangerous condition is not supported by the facts.

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3 Hilger cannot specify when he went back out to Lot #3 and observed the log on the ground. First, he testified it was weeks after the accident and then he said it could have been sometime in 1995 (the accident occurred on August 15, 1994). Unlike the plaintiff in *Andrew v K Mart Corp*,181Mich App 666, 669; 405NW2d 27 (1989), who observed the defect in the rug immediately after she tripped and fell, Hilger never saw what caused the tractor to tip on the day of the accident and did not observe the alleged log until an unspecified number of weeks or months after the accident.

4 The fact that Hilger previously mowed the lot subsequent to defendant's husband's death places Hilger in a catch-22. If, as defendant indicated, her husband placed wood on Lot #3 while he was alive, Hilger should have known of the log by virtue of his prior experiences. On the other hand, if the log was placed on the property sometime after Hilger had last mowed the lot, then he has failed to establish that defendant knew or should have known of this log.

For the reasons stated above, we find that summary disposition for defendants was properly granted.

Affirmed.

September 7, 1999

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Jeffrey G. Collins

Court of Appeals, State of Michigan

ORDER

Robert G. Hilger v. Edith M. Lawrence
Docket No. 206103
LC No. 95 528053

The Court orders that the motion for rehearing is DENIED.

November 19, 1999

/ s /
Brian K. Zahra, Presiding Judge

MICHIGAN SUPREME COURT
Lansing, Michigan

ORDER

Entered: September 12, 2000

No. 115995

ROBERT G. HILGER and GAY E. HILGER, Plaintiffs-Appellants and Cross-Appellees, v. EDITH M. LAWRENCE and the EDITH M. LAWRENCE TRUST Defendants-Appellees, and Cross-Appellants.	SC: 115995 COA: 206103 Wayne CC: 95-528053-NI

On order of the Court, the motion for immediate consideration is considered, and it is GRANTED. The application for leave to appeal from the September 7, 1999, decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The application for leave to appeal as cross-appellant and the motion to consolidate this case with *James v. Alberts* (Docket No. 114454) are moot and are therefore DENIED.

September 12, 2000 /s/
Deputy Clerk

MICHIGAN SUPREME COURT
Lansing, Michigan

ORDER

Entered: December 27, 2000

No. 115995

ROBERT G. HILGER and GAY E. HILGER, Plaintiffs-Appellants and Cross-Appellees,	SC: 115995 COA: 206103 Wayne CC: 95-528053-NI
v.	
EDITH M. LAWRENCE and the EDITH M. LAWRENCE TRUST Defendants-Appellees, and Cross-Appellants.	

On order of the Court, the motion for reconsideration of this Court's order of September 12, 2000, is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Cavanagh, J., would grant reconsideration, and on reconsideration, would grant leave to appeal.

December 27, 2000 /s/
Deputy Clerk

THE DEPOSITION OF ROBERT G. HILGER

ROBERT G. HILGER and GAY E. HILGER,
Plaintiffs- Appellants,

v. Wayne Circuit Court
LC No.95-528053 NI

EDITH M LAWRENCE and
the EDITH M LAWRENCE TRUST,
Defendants- Appellees.

THE DEPOSITION OF ROBERT G. HILGER
Taken on February 26, 1996

MR. BRYANT: Let the record reflect that this is the discovery deposition being taken pursuant to notice and agreement of counsel and may be used as provided under the Michigan Court Rules and statutes.

EXAMINATION

BY MR. BRYANT:

Q. State your name for the record please.

A. Robert Gregory Hilger, H-i-l-g-e-r.

* * *

Q. We're here today as a result of an incident you were involved in on August 15, 1994. Do you recall that incident?

A. Yes, sir.

Q. What day of the week was that?

A. I believe it vas a Sunday, if I'm not mistaken.

Q. What time of day did this accident happen?

A. Approximately one p.m.

Q. This accident happened, I guess, at the property of Edith Lawrernce, is that correct?

A. Yes, it is.
Q. Are you related to Edith Lawrence?
A. Son-in-law.
Q. Is Gay her daughter?
A. Yes, sir.
Q. What time had you arrived over at Ms. Lawrence's place on Sunday, August 15,1994?
A. Approximately 12:30,around that time.
Q. Why did you go over to Mrs. Lawrence's house at that time?
A. To cut weeds in her field.
Q. Did she request that you come over on Sunday and cut those weeds?
A. No, sir.
Q. Why were you doing it?
A. We took over the responsibility of all maintenance on her property, when her husband died. Myself and the teenagers were responsible for cutting the fields and the grass and keeping the maintenance up that she couldn't do without her paying to have it done.
Q. You say you were responsible. How did you get this responsibility that you talk about?
A. We kind of took over the responsibility. We saw that she needed it done. Things that needed to be done, we tried to do for her, to keep up her property.
Q. She didn't request that you do this, you just took it upon yourselves?
A. Yes, we took it upon ourselves.
Q. You and the boys were taking care of cutting the lawn, cutting the weeds, this type of thing, right?
A. Yes, sir.
Q. How long had you been cutting the lawn and cutting the weeds for Ms. Lawrence?
A. Since her husband died. which is approximately--I'm not very good on dates, but I believe he died a year after we were married. So, it

would be somewhere in 1992, we took over the responsibility of taking care of things at her house, on her property.

Q. When you say "we", who are you talking about?

A. The teenagers, our family.

Q. Is that the three boys, Adam, Tim and Robert?

A. Not Robert. He was too young to help. But Tim and Adam and myself.

Q. When you say taken over the responsibility for this property, what did you do when you took over this responsibility?

A. Different things. Changed light bulbs, cut the grass, took care of the pool, things that needed to be done that she couldn't do.

Q. That, I understand. I'm just trying to figure out what things you did that she couldn't do, when you started to care for these things. You cut the grass, cared for the pool, changed light bulbs?

A. Changed light bulbs, changed fuses, did repair on the tractor, changed the floodlights in her parking area that she has on her property, different maintenance things, different personal things, like gardening and helping her plant her gardens, and just miscellaneous odds and ends that needed to be done, that she depended on her husband to do, and now everything was falling on her.

Q. So, you had been cutting the grass over there at Mrs. Lawrence's place for at least a couple of years before this incident occurred?

A. Since her husband died.

Q. You indicated he died 1992. The accident happened in August of '94. So, is that approximately two years, two seasons, maybe, that you would been cutting grass over at her place, actually three seasons, the '92 season, the '93 season and the '94 season?

A. Yes, I would assume so, yes. We took over the responsibility, since her husband had passed away. It was in 1992 that he passed away. We took of care everything that needed to be done.

Q. Is my statement correct that you had been doing the yard work over there and helping out the summer of 1992, the summer of 1993 and the summer of 1994?

A. Yes, sir.
Q. Part of these duties would be to cut the grass those three summers?
A. Yes.
Q. You were riding a tractor at the time this incident occurred, a Ford tractor of some kind?
A. Yes.
Q. How do you describe this tractor, other than a Ford tractor. Is there any other way to describe the tractor?
A. It was an older Ford tractor. I don't remember the model number. There is a model number on it but it was an older model. It was a large Ford tractor, farm type tractor.
Q. Does that tractor belong to Mrs. Lawrence?
A.. Yes, sir, it does.
Q. Had you been driving that tractor the summer of '92, '93 and, '94 when you did yard work over at Mrs. Lawrence's place?
A. Most of the time.
Q. The time of the accident was not the first time you would rode that tractor?
A. No , sir.
Q. Approximately how many times had you ridden that tractor, from 1992 through 1994?
A. Approximately three to five times.
Q. Those three to five times that you rode the tractor, from '92 through 1994, what did you do on those occasions?
A. I don't understand what you just said.
Q. You indicated you rode the tractor three to five times, maybe, between the summer of 1992 and the summer of 1994. What did you do on those three to five occasions that you drove this Ford tractor, before the accident of August 15,1994?
A. Cut the fields that needed to be cut. That was the only reason for that tractor's use.
Q. This Ford tractor you were using at the time of the incident was used only to cut the weeds in the fields around Mrs. Lawrence's

property?

A. Yes, sir.

Q. Approximately how many acres did she have there?

A. I'm not really sure of the amount of acreage. I know there are three fields, plus the home. I have heard remarks--this is hearsay--but I heard she has a total of ten acres over there.

Q. She has three fields around her property out there that grew up in weeds and you used the tractor to cut these weeds?

A. Yes, sir.

Q. When did you first cut these three fields of weeds? Did you first do it back in 1992?

A. The summer of 1992, we started the maintenance duty as far as when the weeds needed to be cut. There was only two people that felt comfortable driving that tractor, and I was one of them.

Q. Did you then cut these fields of weeds back in 1992, using this Ford tractor?

A. Yes, sir.

Q. How many times did you cut these fields of weeds back in 1992?

A. When needed.

Q. How many times was that?

A. That's unknown. Approximately every two to three weeks, these fields needed to be cut. It depended on the growth and how high they were.

* * *

Q. I'm trying to get some basis of how many times you would mow these fields of weeds back in 1992, during the summer season, the weed season or grass season or whatever we're talking about.

A. I can't give you an answer to that . The only thing that I can say is that we cut the fields when the grass needed to be cut. It wasn't on any type of schedule or any type of maintenance period. If it looked like it needed to be cut, we would then cut the grass.

Q. Would you cut it, on an average, three times during the summer season, the wheat season, the grass season?

A. On an average, I would say three to four times. I'm not really sure,

though.

Q. So, you would guess that maybe in 1992, when you first started mowing the weeds for Mrs. Lawrence, that you probably cut these three fields of weeds at Mrs. Lawrence's place three or four times, using that tractor?

A. Yes, sir, approximately.

Q. The same is true in 1993, you probably cut the weeds, using the Ford tractor, approximately three or four times during the summer?

A. Approximately.

Q. 1994, when the accident happened in August, was this maybe the fourth time you had cut the weeds during the summer of 1994?

A. Of the three fields that she has, two of the fields are cut on an average of three to four times during the growing season. The field that the accident occurred on, it's only cut once or twice during the growing season.

Q. Let's back up, then. For the summer of 1992, did you cut this particular field where the accident occurred once or twice during the growing season?

A. Yes, sir.

Q. The same in 1993, you cut it once or twice?

A. I have only cut that field, between 1992 and when the accident occurred, approximately two to three times.

Q. Total?

A. Total.

Q. Why the distinction between the field where the accident happened and the other two fields? Which got cut more often?

A. The field where the accident occurred, you could not see from the road. It was less a priority than the other two fields, which were visible from the road and needed to look trim and neat.

Q. How many times have you cut this field where the accident occurred during 1994, before the accident happened?

A. I don't believe I cut it at all that year. When the accident occurred is the first time that I was going to cut that field.

Q. I would like to give you a piece of paper here, and if you could draw me a layout of Mrs. Lawrence's property, roughly showing me the fields that we are talking about, the property where the house is, and eventually I am going to want you to put in the field where the incident occurred.

(Deposition Exhibit One, a diagram, was marked for identification.)

BY MR. BRYANT:

Q. You have drawn me a rough diagram here which I have had the court reporter mark as Deposition Exhibit Number One. What roadway is this that we're talking about here?

A. Meridian. That's the main roadway on Grosse Ile.

Q. You put the location of the house and you have "barn" written here. Those are the areas where the house and barn are located?

A. Yes.

Q. You have "tree line" written here?

A. She's got apple trees that come all the way down to, the road on both sides of the driveway.

Q. The driveway goes out to Meridian Road and the trees line the driveway?

A. Right.

Q. You have the three other squares here, number one, two and three. I assume those are the three fields that have the weeds in them and that you cut?

A. Yes.

Q. The field number three where you have drawn an X, that's approximately the location of where the incident occurred?

A. Yes, sir.

Q. Which is north, south, east and west on here?

A. This is east, this is west, north and south.

(A recess was held.}

MR. BRYANT: Had you driven this tractor before in 1994, mowing lots one and two, before the accident of August of 1994?

A. Occasionally.

Q. How many times would you say you had used the tractor in mowing lots in 1994, before the accident of August 15, 1994?

A. Maybe once.

Q. When would that have been, approximately, in relation, to the accident of August, 1994?

A. The beginning of the growing season.

Q. Around May?

A. I'm not really sure of the exact date or month. The blue tractor, which is the large tractor, was only driven by myself and my wife's son. So, we took turns cutting the fields. So, I might have cut the other two fields maybe once.

Q. In 1994?

A. In 1994.

Q. That was before August of 19941 correct?

A. Yes, sir.

(Deposition Exhibit Number 2, a photograph, was marked for identification.)

MR. BRYANT:

Q. I have some photographs here that have been provided by your attorney. I am going to show you a photograph marked as Exhibit Two. You are talking about the blue tractor. Is that the blue Ford tractor that you were talking about that you were riding at the time of this incident?

A. Yes, sir.

Q. That's the same blue Ford tractor that you had used on the two or three prior occasions when you mowed lot number three, before the accident of August of 1994?

A. The amount of times that I have used that on lot number three is unknown. Approximately one time during 1994, I used that. I take that back. That is not correct. August 15th of 1994 is the first time that I used that tractor on lot number three. The other two fields, I might have used it once or twice during that year.

Q. You used it once or twice in 1994, before August 15th of 1994?

A. On lots one and two; yes, sir.

Q. You are familiar with that tractor because you had been driving it at least since 1992?

A. Yes, sir.

Q. There was nothing strange about the tractor, you how to operate it?

A. Yes, sir.

Q. You had used it on several occasions, and we're talking about two or three times a summer, to mow the weeds, at least in lots numbers one and two; is that correct?

A. Approximately a couple of times, yes, sir, I have used that tractor.

Q. Only you, and you say Tim used that tractor?

A. Yes, sir.

Q. When you said earlier that you made repairs to the tractor, is that the tractor you would make repairs to?

A. She's got two tractors. That tractor and a smaller International type, that is used on cutting the fields and the grass on her property. I have changed spark plugs in that, minor repairs.

Q. So, you arrived over at Mrs . Lawrence's place around 12:30 on August 15, 1994, I believe you indicated?

A. Approximately 12:30.

Q. The accident happened at about one o'clock, you say?

A. I believe that is the correct time, yes.

Q. Between the time you had arrived over at Mrs. Lawrence's place until the time of the accident, what did you do?

A. Could you please repeat that?

Q. You indicated that you arrived at Mrs. Lawrence's around 12:30. The accident happened at around one o'clock. What did you do from the time you arrived at Mrs. Lawrence's up until the time of the accident?

A. I started to cut the field.

Q. Which field?

A. Field number three, where the accident occurred.

Q. What was the first thing you did when you arrived at Mrs. Lawrence's house?

A. Dropped off my son at her house, gave him the key to get in.

Q. At whose home?

A. At my mother-in-law's home.

Q. Mrs. Lawrence?

A. Mrs. Lawrence. I walked out to the barn, started the tractor and commenced cutting the field.

Q. You walked out to the barn in photograph Number Two, Exhibit Number Two?

A. Yes.

Q. That is you in the photograph, Exhibit Number Two?

A. Yes, sir.

Q. You took the tractor out and started cutting field number three, as shown in Exhibit One; is that correct?

A. Yes, sir.

Q. How long had you been cutting grass in field number three, before the incident occurred?

A. I had just started cutting that field. I entered the field here.

Q. Wait a minute . Show me the gate where you entered the field.

A. There's no gate, there's just an opening.

Q. Okay.

A. I entered the field hear and started cutting the east fenceway.

Q. Draw an arrow there. Where you are talking about?

A. And I cut around here and got to this point, where the accident occurred.

Q. Where did you enter the field? Did you enter the field from the area where the barn is here?

A. Yes.

Q. You have an "X" there. I'm going to draw an arrow where you come in this way. Is that what you did?

A. Yes, sir.

Q. And made a right turn?

A. Yes, sir.

Q. So, then, you went east along field number three and then you went north, then you went west, then you came south, back to where the gate was, approximately; correct?

A. Yes, sir.

Q. Then, you again made a left turn to go east on the second –would you call it the second pass on the south side of the field?

A. I had just came--there is a bush here that you have to go around, that separates the opening to this field. I had just started to go around that bush to make the second pass or second cut.

Q. I am going to draw an arrow here to that location right there. That's a bush; correct?

A. Yes.

Q. I will write "bush". Is that correct, the way I did it there.

A. Yes, sir.

Q. So, as you came around on the west side of the you had to go past that bush: is that correct, like this?

A. Yes, sir.

Q. You were going past the bush. That's where the incident occurred?

A. The site of the accident is approximately the middle of that bush. So, I didn't complete the complete circle on the first pass. The tractor started to tip approximately here.

Q. That's about where the accident was, is about here?

A. Yes, sir.

Q. We will draw another arrow there and put "accident", Okay?

A, Uh-huh.

Q. Is that about right?

A. Yes, sir.

Q. Is that roughly what we're talking about?

A. Yes, sir.

Q. Is there any way you can describe the speed of the tractor, like shown in Exhibit Number Two, at the time this all took place?

A. It was slow enough to cut the field. The field is full of bumps and

ridges and I was going slow enough to make a good cut on the field.
Q. What gear did you have it in?
A. That, I don't know, sir.
Q. How many forward gears are there on this tractor?
A. I believe there's five.
Q. But you don't know what gear you had it in?
A. No, sir.
Q. Do you have any recollection of what gear you usually would mow these weed lots in?
A. I tried to go as slow as possible.
Q. Does that mean you were in first gear?
A. I don't know. I really couldn't tell you the exact gear that I was in or what gear I use. I go as slow as possible to make a good cut when I use that tractor.
Q. You think you might have been in first gear?
A. Could be. It could be second gear, to sometimes, when the weeds are thick, you can't go too slow because it will stop the tractor, pulling the brush hog. It might have been the second gear, I'm not sure.
Q. I assume there's a hand throttle on this tractor; correct?
A. A lever, not a throttle. It's a lever that is located on the steering column, which is regulated by the gear that you are in. You can make it go faster by pushing down this lever but it's – like I said, if you don't touch it, it goes at the speed of the gear that you are in.
Q. But this is something that's set by the driver; correct?
A. No, sir, it's not.
Q. How do you adjust the speed of the tractor?
A. By the gear.
Q. Is that the only way you adjust the speed of the tractor?
A. Yes, sir.
Q. So, the tractor only has five speeds?
A. I believe there's five. It I'm not really sure, without looking at it again. I'm almost sure it has five gears on that tractor.
Q. If you are in gear number one and want to go faster, what do

you do?

A. You push down on the throttle control.

Q. That's the throttle control on the right side of the steering column; is that right?

A. Yes, sir.

Q. So, that changes the speed of the tractor, by adjusting this throttle lever on the right side of the steering column; correct?

A. It adjusts the RPM on the tractor.

Q. What's an RPM?

A. It does the speed.

Q. What's an RPM?

A. Revolutions per minute.

Q. What does that have to do with the speed of the tractor?

MR. DETTMER: I don't want to step in here and be argumentative. This isn't a test in mechanics. I mean whether he understands the consequences of the terminology "RPM" or what that means is irrelevant to the case. The question is how does he increase the speed. That's the question you started with and you haven't given him a chance to answer that question.

MR. BRYANT: Do you have an objection.

MR. DETTMER : Yes.

MR. BRYANT: What is the objection?

MR. DETTMER : You ought to not be argumentative. Give him a chance to answer the question.

MR. BRYANT: Do you have something that you want to say, with reference to how you adjust the speed of the tractor?

A. The speed is adjusted by the gear that you are in. It adjusts itself by the speed of the engine. When you are in first gear it will go slower. Maybe when you are in second gear it will go faster. It's adjusted by the gear in you are in when you put a load on the brush hog or what you are towing.

Q. Is there any other way you adjust the tractor, other than the gears one through five that you indicated earlier?

A. No, sir.
Q. You cannot adjust the speed of the tractor from this throttle lever that's on the side of the tractor you mentioned earlier?
A. When you push the throttle lever down, it will make the tractor go faster. Okay? If you do not touch the throttle lever, it will go just as fast as what the gear that you are in, it will regulate itself, automatically going down or up to what kind of load you are putting on that tractor.
Q. Where was this throttle set at the time of the accident?
A. I'm not really sure.
Q. At any time, from the time you left the barn and up until the time of the accident, had you adjusted the throttle lever on the right side of the steering column?
A. No, sir.
(Deposition Exhibit Three, a photograph, was marked for identification.)
MR. BRYANT: I am showing you a photograph that has been marked as Deposition Exhibit Number Three.
MR. DETTMER: Are you going to take that out and make it part of the record, so we know, down the road? Do you want to do that now? Let me take a picture of it, so I know. Go ahead and ask him a question.
MR. BRYANT : What is the device on the rear of the tractor shown on Exhibit Three?
A. Brush hog.
Q. Is that what you were mowing lot three with at the time of the accident?
A. Yes, sir.
Q. How do you adjust the speed of that?
MR. DETTMER: I'm sorry? Are you suggesting the speed of the brush hog--
MR. BRYANT: He said he didn't know.
MR. DETTMER: Okay.

MR. BRYANT : On the diagram, as you came around the corner there by the bush and you were getting ready to go down the south side of the field , what happened?

A. The tractor, approximately the center of this bush, started to tip.

Q. Which way?

A. To the left. I was trying to get off the tractor at that time, as we were still moving. The tractor was still going forward. I couldn't get off the tractor and it finally came to a stop, when it hit a tree on the east fence-way.

Q. It hit a tree on the east side of field number three?

A. Yes, sir.

MR. DETTMER: Would you mind putting a mark where that is?

MR. BRYANT: Wait.

A. The south side. Pardon me. It would be the south side.

Q. Where was the tree that the tractor hit, that stopped the tractor after you were trying to get off? Would you mark that?

A. (The witness complied).

Q. Draw an arrow and identify what that is.

MR. DETTMER : What do you want it to say, "tree"?

MR. BRYANT : You have written "tree" and I put an arrow to the "X". Is that the X--you indicated on the south side of lot three, that the tractor hit and stopped itself?

A. Yes.

Q. I assume that that was a standing up tree, a growing tree in the fence line there? Is that what it was?

A. Yes, sir.

Q. Where were you at the time this tractor hit the tree

A. Hanging onto the steering wheel.

Q. Were you still sitting in the seat on the tractor?

A. No, sir. I wasn't sitting, I was hanging off the tractor and part of me was on the tractor.

Q. Which direction was the tractor going at the time it started to tip to the left? Using your diagram here, was it going north, south, east

and west or partially in between those directions?
A. When it started to tip, we were going in a southerly direction.
Q. What caused the tractor to start to tip?
A. A log.
Q. Where was this log?
A. Underneath the growth of the bush that was--I was attempting to go around.
Q. Had you ever seen that log before?
A. No, sir
Q. How long had that log been there? Could you give me, an indication of whether it had been there for years or overnight or anything like that?
A. No, sir. Unknown.
Q. Had you ever seen that log before when you mowed lot number three during the summer of 1992 and 1993?
A. No, sir.
Q. Did the tractor run over this log or just run into it?
A. The right tire went over on the top of it.
Q. The right front tire?
A. Yes, sir.
Q. When did you first see that log? Where was the tractor in relation to the log?
A. I didn't see that log the day of the accident.
Q. You never saw the log, at all, on August 15th, 1994?
A. No, sir.
Q. When did you first observe this log that you believe was what caused the front tire to go over the log?
A. When I was able to walk a little bit over the field to see what really happened out there.
Q. That's the first time you saw the log, was when you walked back out to the field after the accident?
A. After the accident, yes.
Q. How long after the accident was that?

A. Weeks.
Q. I don't know what that means. That could be two or --
A. That's unknown. I was in the hospital for five days and I was unable to move for an extended period of time, which I can't give you even an approximate time that I was homebound. I eventually went out there to find out what happened and saw the log.
Q. Was this in 1994 or 1990 five?
A. It could have been in 1995. I'm not sure.
Q. Did you take any pictures when you were out there?
A. No, sir I didn't.
Q. The pictures that I have been provided and which I'm showing you here, who took those pictures: do you know?
A. Bob Golen (ph.).
Q. When did he take those pictures?
A. The date is unknown.
Q. You are in the one photograph that we have marked as Deposition Exhibit Number Two. Do you know when that photograph was taken, approximately? Approximately. I'm not looking for an exact date.
A. At the start of the case. I don't have any idea what month or day it was taken. I couldn't even give you an educated guess.
Q. This looks like it's in the summertime. You are in shorts and the grass and everything looks green. Is this the summer of 1994 or '95, that it was taken?
MR. DETTMER: He said it was after the lawsuit was started. I don't think it was started in '94.
A. The summer of 1994, approximately.
MR. DETTMER: Bob, think about what you are saying. I want to clarify this. He already said that it was after the lawsuit was started. Do you know when this lawsuit was started?
A. No, sir; I don't. Without having a copy of the date that we started the lawsuit, I don't know if it was summer or fall or spring.
MR. BRYANT: Regardless of when we started the lawsuit, do you know when this picture was taken marked as Exhibit Number Two?

A. After the lawsuit was started. I can't give you an exact month or date on that.

Q. After you say this right front tire went over this log that caused the tractor to tip to the left, you say, this log that it went over, what is the size of it that we're talking about here, diameter-wise?

A. In diameter, approximately 12 to 14 inches. The length is approximately three or four feet.

Q. Where the right front tire of the tractor ran over this 12- or 14-inch diameter log, what happened to you on the tractor?

A. The tractor tried to throw me off of it.

Q. Did you have ahold of the steering wheel at the time the right front wheel hit this log?

A. I had ahold of the steering wheel; yes, sir.

Q. With both hands or one hand?

A. With both hands.

Q. You said the tractor tried to throw you off. What happened to your body at that time?

A. It was hanging off the tractor.

Q. Hanging off the tractor, I assume it was the left side?

A. Yes, sir.

Q. Where was your left foot at the time you were hanging off the tractor, as you say?

A. Dangling on the ground.

Q. Where was your right foot at that time?

A. Stuck underneath the brake pedal.

Q. On the right side of the tractor?

A. Yes, sir.

Q. You had both hands on the steering wheel?

A. Yes, sir.

Q. Was your butt still in the tractor seat?

A. No, sir.

Q. Where was that?

A. Hanging off on the left side of the tractor.

Q. Did the tractor's right rear wheel go over the log, also?
A. No, sir.
Q. After the right front wheel went over this log and you were hanging off to the left side of the tractor, what happened to you then, after that?
A. I felt my leg being thrown against the steel of the tractor.
Q. Which leg?
A. Left leg.
Q. What part of the tractor did your left leg hit?
A. I believe, the steel bar that comes from the front tires to the steering column.
Q. I think there's about three or four photographs here that shows the left side of the tractor. Do any of those show the part of the tractor where you say your left leg was against the bar?
A. I believe it's this bar right here.
Q. Do any of those photos show it better?
A. That one. That's the bar and that's the bar.
(Deposition Exhibit Number a photograph, was marked for identification.)
MR. BRYANT: I have marked the photograph there as Exhibit Number Four. That's the bar on the left side of the tractor that you say your leg was against at the time it tipped to the left?
A. When the tractor tipped, my leg was thrown against that bar. It wasn't laying against it. It was thrown against it.
Q. By the tractor tipping to the left?
A. No. By the movement of the tractor.
Q. What movement of the tractor ?
A. The tractor was still moving.
Q. Moving in a forward--
A. Forward motion.
Q. Did you at any time slow the tractor down from the time it hit the log until it hit the tree?
A. The tractor was going slow. When we hit the log and I was in so

much pain, I didn't realize that I could stop--I didn't think I could stop the tractor.

Q. Did you do anything to try to stop the tractor, from the time that you hit the log until you hit that tree?

A. No, sir, I didn't.

Q. Here's a couple of photographs showing the right side of the tractor, correct? Do you agree to that?

A. Yes, sir.

MR. DETTMER : Do you want to mark those?

MR. BRYANT: Do either one of these photograph show--

MR. DETTMER : You don't want to mark them?

Q. --the pedal your right foot was stuck in at the time the tractor was tipping to the left?

A. The one here shows where my foot was underneath the brakes.

(Deposition Exhibit Number Five was marked for identification.)

MR. BRYANT: I have marked the photo as Exhibit Number Five. That's the side of the tractor and it shows two foot pedals there?

A. Yes.

Q. Your right foot was caught under one of those foot pedals at that time?

A. Both of them.

Q. What are those foot pedals for?

A. Brakes.

Q. Both are for the brakes?

A. Yes.

Q. The pedal would be to the right and the picture is for the left rear wheel?

A. I believe the left--

MR. DETTMER: Wait a minute. Take your time. Look at it.

MR. BRYANT: Wait a minute.

MR. DETTMER: You are suggesting something that's not even accurate.

MR. BRYANT: Well, let him tell me if I'm not. I want his testimony,

I don't want your testimony.

MR. DETTMER : Why don't you ask him other than it's the left brake. What's it for?

A. Both those pedals are used for brakes.

MR. BRYANT: One for the right rear wheel and one for the left rear wheel; correct?

A. I'm not sure. If I was an experienced farmer who used those type of tractors, I would know. All I know is those two pedals are for the brakes.

MR. DETTMER: You don't have a current recollection of the exact point?

A. Right.

MR. BRYANT: During the time you were driving this tractor up before the time of the accident, which one of those pedals would you use to stop the tractor?

A. If I needed to stop the tractor, I would have used both those pedals.

Q. Could you use both pedals with one foot?

A. Yes, sir.

Q. There were no brake pedals on the left side of the tractor, were there?

A. No, sir.

Q. After your left leg then hit this bar and your right foot was caught underneath the brake pedals and your butt was over to the left side of the tractor and you still had ahold of the steering wheel with both hands, what happened to you, then, after that?

A. When I finally hit the tree, I screamed for help, because when the tractor started to tip and my leg was thrown into the steel of the tractor, I heard crushing of bone in my leg.

Q. What part of your leg?

A. Around the knee part. I was in extreme pain . I was trying to hold on or trying to get off that tractor and couldn't. When I finally hit the tree is when I started screaming for help.

Q. When you say you were trying to get off the tractor, how were you

trying to get off of the tractor?
A. Any way I could.
Q. When you tried to get off the tractor, as you testified to, what were you doing to try to get off of the tractor?
A. I was trying to jump clear, because all I could see was the tractor going completely over and I was trying to get off that tractor the best I could.
Q. You were trying to get off to the right or to the left or to the rear or what?
A. To the left.
Q. That's the way the tractor was tipping, was to the left?
A. Yes.
Q. How far was, approximately, from the point to where the accident occurred, where you hit the log until the location where you hit the tree? What kind of distance are we talking about there?
A. Twenty or 25 feet, approximately.
Q. During that 20 or 25 feet, did you at any time slow the tractor down?
A. The tractor was going as slow--
MR. DETTMER : I think that's been asked and answered. You previously asked him that question and he has previously testified.
MR. BRYANT: What was your answer to that question, "no"?
A. That's not true, sir.
MR. DETTMER: Wait. The answer stands as it is.
MR. BRYANT: Are you going to tell him not to answer that question?
MR. DETTMER : Yes.
MR. BRYANT: How fast was the tractor going at the time it hit the tree? Do you have any idea at all?
A. No, sir.
Q. Was it still in the first or second gear that you had the tractor in when you were mowing around the outside of lot number three?
A. Yes, sir.
Q. Was the throttle setting still the same as it was at the time you

were mowing the first round of lot number three?

A. Yes, sir.

Q. What happened to the tractor after it hit the tree?

A. It came to an abrupt stop.

Q. What happened to you or your body at the time the tractor hit the tree and came to an abrupt stop?

A. I was still hanging on. I couldn't get off the tractor.

Q. You were still hanging off on the left side, like you described earlier?

A. The tractor re-righted itself and I was trying to get off and couldn't and I was in extreme pain.

Q. When the tractor--strike that. When the tractor hit the tree and came to a stop, were you still on the left side of the , tractor, like you described earlier?

A. That's unknown right now.

Q. You did not get thrown off and you were not on the ground, though, were you?

A. No, sir.

Q. You still had both hands on the steering wheel, did you?

A. Yes, sir.

Q. The tractor at no time upset on its left side after hitting the log, did it?

MR. DETTMER: I'm sorry? Upset, not upset? I didn't understand the question.

MR. BRYANT: Did you understand the question?

A. No, sir.

Q. At any time after the right front wheel of the tractor hit the log, did it actually upset and fall over on its left side or did it just tip to the left side?

A. Tipped to the left side.

Q. After it hit the log, it came down on all four wheels?

MR. DETTMER: You mischaracterized what he just said, unless you misspoke yourself. You mean after it hit the tree?

MR. BRYANT: That's not what I said. I said after it hit the log with the right front wheel and tipped over on the left side, did it come down on all four wheels .

MR. DETTMER : It's asked and answered.

MR. BRYANT : Are you instructing him not to answer that question?

MR. DETTMER : Yes. This is getting to the point of being abusive, I think..

MR. BRYANT: After it hit the tree and you were still hanging on the tractor, with both hands on the left side of the tractor, what did you do then?

A. Screamed for help.

Q. Did you stay on the tractor or get off the tractor?

A. I couldn't move, sir.

Q. Did you stay on the tractor or get off the tractor?

A. I stayed on the tractor.

Q. You screamed for help. Did someone come and help?

A. Yes, sir, someone did.

Q. Who came to help?

A, The neighbor, sir.

Q. Who was that?

A. I'm not really sure of his name, but his house is on the north side of her property.

MR. DETTMER: You want to indicate that?

A. In this area here.

MR. BRYANT: Then, he came over to help you because you were screaming and your left leg was in pain; correct?

A. He came over because of hearing me scream for help.

Q. When he came over, what did you do then?

A. Cried a lot.

Q. Did you do anything else beside cry?

A. Cussed.

Q. Anything else?

A. A lot of pain.

Q. What did you do?

A. I couldn't do anything.

Q. Did you stay on the tractor?

A. Until I was helped off.

Q. Who helped you off?

A. The neighbor and paramedics.

* * *

Q. Photographs marked as Exhibits 14 and 15, would you tell us what those are?

A. Again, I don't see anything recognizable other than just the field that I was attempting to cut.

Q. You think of that, again, as field number three?

A. Yes.

Q. The tree line that we see there, that is not the bush area or the log area that we' re talking about?

A. That could be the back of the field. I don't know. The tree line goes all the way around--I believe the word is the circumference of the field. There's trees all around that. To tell you that is the tree, I don't know what section of field that is.

Q. With reference to the weeds that we see in 14 and 15, is that kind of the condition of the weeds in field number three as of August 15, 1994, the day of the incident?

A. Yes, sir.

Q. Had you ever run into this log before August 15, 1994?

A. No, sir, I didn't.

Q. When you have mowed the field out there on occasions prior to the date of the accident, apparently you would have to drive past that log to mow the field, would you not?

A. Yes.

Q. Had you seen the log there in 1992 and 1993?

A. No, sir, I didn't.

Q. If I went out there today or when the sun comes out the next time, as far as you know, is that same log still there, that the right front

wheel of the tractor ran over?

A. Yes, sir.

Q. Are there any other photographs that you are aware of showing the log or the location of the log out there where the tractor hit?

A. No, sir.

Q. At the time the right front wheel of this tractor hit this log, which way were you looking, forward or back or one way or the other?

A. Forward.

Q. To your knowledge, does this log look like it had been cut down or had it blown down during a storm?

A.. It looked like it was cut.

Q. Do you know who cut the tree down?

A. No, sir, I don't.

* * *

THE DEPOSITION OF EDITH M. LAWRENCE

ROBERT G. HILGER and GAY E. HILGER,
Plaintiffs- Appellants,

v. Wayne Circuit Court
LC No.95-528053 NI

EDITH M LAWRENCE and
the EDITH M LAWRENCE TRUST,
Defendants- Appellees.

THE DEPOSITION OF EDITH M. LAWRENCE
Taken on March 19, 1996

EXAMINATION BY MS. PETRIK:

Q. Good morning, Mrs. Lawrence. My name is Chris Petrik, and I represent Bob and Gay Hilger in this matter. I'm going to ask you some questions. If you don't understand the question, please let me know and I'll rephrase it. Can you state your full name for the record, please.
A. Edith M. Lawrence.
Q. And your address?
A. 20635 Meridian Road, Grosse Ile, Michigan.
Q. And your birth date?
A. July 22nd, 1929.
Q. How long have you lived at that address on Meridian Road?
A. About 29 years.
Q. Were you married?
A. Am I or --
Q. Were you?
A. Yes.
Q. And your husband's name was?

A. Kenneth.
Q. Lawrence?
A. J. Lawrence.
Q. And when were you and Kenneth married?
A. October 8, 1949.
Q. Is that your only marriage?
A. Yes.
Q. And when did Kenneth pass away?
A. March 4th, 1993.
Q. Did you and Kenneth have any children?
A. Yes.
Q. Can you give me their names and ages?
A. Gay Hilger. She was born in 1954. What does that make her?
MR. BRYANT: That's close enough.
Q. (BY MS. PETRIK) That's fine. Any other children?
A. No.
Q. After Mr. Lawrence passed away, did you remain in the house on Meridian?
A. Yes.
Q. You currently reside there now?
A. Yes.
Q. Do you own the property at Meridian?
A. Yes.
Q. Is the property and the house held in a trust?
A. Yes, it is now, my trust, after my husband died.
Q. What is the name of the trust?
A. Edith M. Lawrence Trust -- Edith M. Lawrence Revocable Trust, dated June 10th, 1993.
Q. Who set up the trust for you, Mrs. Lawrence?
MR.. BRYANT: You mean her attorney's name or --
(BY MS. PETRIK) Was it an attorney?
A. Yes. It starts with a K. I don't remember his name.
Q. And correct me if I'm wrong. The trust was set up on June 10th

of '93?
A. Yes.
Q. What was the purpose for setting up the trust?
A. Because I was the only one for my -- after my husband died. Then I didn't want to put property in my daughter's name, and that -- and I was advised to make a revocable trust, that it would make it easier for her.
Q. Does the trust hold any other property other than the property on Grosse Ile?
A. Oh, yeah.
Q. What else would the trust cover?
A. My ten-year-old car, a half interest in a condo in Florida and, you know, the bank accounts and the bonds.
Q. Okay. When Mr. Lawrence was alive, did Mr. Lawrence keep up the property and the outside maintenance?
A. Yes.
Q. Was that quite a task to undertake?
A. He was retired, so he did it.
Q. So he lived in the house for 29 years. Was he employed at all while you were, residing there?
A. Yes. He was supervisor at Great Lakes.
Q. When did he retire?
MR . BRYANT : Approximately.
(BY MS. PETRIK) As best you can remember.
A. He had been retired -- I think he had been retired about 20 years.
Q. Prior to his retirement, who kept up the outside property?
A. He did.
Q. Do you know how much acreage?
A. Ten acres.
Q. Are there different fields or lots involved in this ten acres?
A. Yes.
Q. Is there a barn on the acreage?
A. It's a stable.

Q. Is there a home on the property?
A. Yes.
Q. Would you mind sketching out what the acreage looks like and the location of the stable and the home?
MR . BRYANT : Could I suggest you just use the other one that was already made?
MS. PETRIK: Will you stipulate to that being a correct depiction?
MR . BRYANT: Well, let her see if that's correct as I show this to her, a rough layout of the property.
(BY MS. PETRIK) Is that a correct depiction?
A. Well, this property goes a little further back.
Q. Lot number three you're indicating?
A. Yes.
Q. It goes a little further back, back to some woods. This whole section here is five acres. Two and three is five acres.
Q. Can you show me how much farther lot three would go back?
A. It goes back maybe this far again. I mean I don't know how many feet, but so this would go up like this.
Q. All right. The back of lot three, is that lined with trees?
A. The very back is.
Q. Is it a wooded area?
A. Yes. The very back and then -- as a matter of fact, it's like fence line, trees around the fence line all the way around.
Q. Are the northeast, southwest, are those correct on that diagram?
A. Northeast --
Q. Is that how the property lies?
A. Yes.
Q. Okay. When your husband was alive, he cut all of the acres?
A. Yes.
Q. Mrs. Lawrence, is there an ordinance that requires that you keep the weeds under a certain length, if you know?
A. I don't know.
Q. How often did your husband cut the fields, one and two? How

often did he cut one and two?
A. Oh, one, yeah, he cut that regularly because that's in front of the house. I mean, see, this is all fences. We have a decorative fence here, a wood fence, and so this is like part of the yard.
MR . BRYANT : Wait. If you want, I can make a copy of this if you want to do some marking on it.
MS. PETRIK: That's fine.
A. But in the summer, my husband was on the tractor almost every night a little bit here and a little bit there.
(BY MS. PETRIK) So it was a lot to keep it up?
A. Yes.
Q. How often did he cut the second lot?
A. You know, I never questioned him.
Q. Was it as often as he cut the first?
A. No. This lot is like -- we called it the field. This is like a pasture, and this didn't require as much as this. This is more like a lawn.
Q. All right. What about the third field?
A. I don't know how often he cut that. You can't see it from the road. You can't see it from the house. It's completely surrounded by trees. I mean I didn't question him.
Q. Sure. Okay. If you had a stable, did you ever have to board horses there?
A. No, we didn't board them. We had horses.
Q. How many horses did you have?
A. We had a couple riding horses, and then my dad had grazing horses. My dad lived next door so he kept his horses at the stable.
Q. Now, you say your dad lived next door. Was it east or west?
A. He lived south, next door.
Q. It would be south. We'll wait for the diagram to come back.
(Discussion off the record.)
DEPOSITION EXHIBIT 1WAS MARKED BY THE REPORTER FOR IDENTIFICATION.
(BY MS. PETRIK) Mrs. Lawrence, I'm going to show you a diagram

that's been marked number one. These are the lots we're talking about. Can you show me where the wooded area is where you're saying that there are woods behind the property line?

A. Well, I don't know how much further.

Q. That's all right. Just a rough estimation.

A. And this is all woods back here, and then the fence lines have all trees and bushes on it. They're overgrown quite a bit. I can't even see through all along here.

Q. That's wooded area?

A. Yes. This is all fence line and this is all grown up and this is all grown up. This isn't. This isn't.

Q. What is that that you're drawing the line on?

A. Here? This is the barnyard. The barn is in here. The house sits up a little bit up here because we've got a backyard, and this is all trees and this is all trees. It's almost like all by ourselves.

Q. Do you have many trees on the property?

A. Yes. It's all in the front, orchard.

Q. And do they line the driveway onto the property?

A. Yes. They're dying though, getting old.

Q. So between two and three, this is a fence?

A. Yeah, there's a fence there and it's all overgrown. See, this is what we bought first. The people we bought it from owned this, also.

Q. So you bought lot one first, the barn and the house?

A. Yes. It's two pieces of property actually. It's this section and then this section.

Q. All right. Lot one, the barn and the house. When did you buy lots two and three, approximately?

A. They put it up for sale -- the township owned them and they put them up for sale in -- gosh --

Q. As best you can remember.

A. Time goes so fast. I would say possibly 20 years ago because the township put them up. We bought them because we just would rather have it than to have somebody else there.

Q. So your father lives on the south side of you?
A. Yes.
Q. How far over is his home from you? Is there a lot between you --
A. No. He had three acres 'and he was next door.
Q. What is your dad's name?
A. Ernest T. Porter.
Q. Mrs. Lawrence, do you own a tractor?
A. Yes.
Q. Do you own more than one?
A. Yes.
Q. How many tractors do you own?
A. Well, one big tractor and one medium-sized tractor.
Q. I'm going to show you a couple of photographs, three photographs. Is this one of the tractors you own?
A. Yes.
Q. Are all of these the same tractor?
A. Yes.
Q. Can you mark these?
A. A blue tractor and a red tractor.
DEPOSITION EXHIBIT 2 THROUGH 4 WERE MARKED BY THE REPORTER FOR IDENTIFICATION.
Q. (BY MS. PETRIK) Mrs. Lawrence, this photograph has been marked Exhibit Number 3. It shows the blue Ford tractor. Who purchased that?
A. My father.
Q. And do you know approximately or when he purchased it?
A. Right after he moved out there, we both moved the same year, in about '67 because between us, we had so much property. He bought the tractors.
Q. So your father bought that tractor approximately 1967?
A. Let's say next summer, '68, because we moved in the late summer.
Q. Did your father use it on his property?
A. No. He used it on mine.

Q. So he bought it to use it on your property?
A. Yes. Because he wanted to store horses there.
Q. All right. Did your father ever cut the grass?
A. No.
Q. Your husband used to though?
A. Yes.
Q. Did he buy it for you and your husband?
A. Well, he didn't buy it -- he also used it to cut the field across from our business, and he stored it on his property. He stored both of them. But it was too big for a front yard. See, it has a bush hog on it. It's for fields and small trees and that you can cut right down.
Q. When you say he cut the fields by your business, where was your business?
A. In Wyandotte we have an empty field.
Q. And -- -and what was the field?
A. Star Screw Products.
Q. And how long did you have the business?
A. 50 years.
Q. Did you sell it?
A. No.
Q. Do you still have it?
A. Yes. My brother and I run it now.
Q. What does the business" do?
A. Manufactures screw machine products.
Q. Did your father store this on your property?
A. No, he had it on his. But when my father died, my brother and I divided up his, and we took the tractors because we had the property.
Q. When did your father pass away?
A. '87.
Q. This has been marked Exhibit Number 4. In addition to the blue tractor, the Ford tractor, there's a red tractor?
A. Yes.
Q. Who purchased the red tractor?

A. My dad.
Q. Do you know when?
A. Not offhand. That's the second one he's had.
Q. So he purchased it after the Ford tractor?
A. Yes, because he found that this was too big to do yards. But that's the second one, so that's quite a bit after.
Q. When Mr. Lawrence cut the fields, what tractor did he use?
A. Different ones, but he usually used this one.
Q. Mostly the blue one?
A. The little field, too, sometimes held use the red one. One and two for the red. No. Wait a minute. This is two and three. I call the house one.
MR. BRYANT: Well, just use the numbers that are on there.
A. All right. One, the red tractor. Two and three, the blue because he usually let them get longer.
Q. (BY MS. PETRIK) Mrs. Lawrence, how long would he let two and three grow before he would cut it; do you have any idea?
A. No, I don't.
Q. Do you have any idea how many times in the summer he would cut those fields?
A. No, because like I say, he'd cut a little bit at a time. I couldn't see him from the house and I worked and he'd go out. It was like I always thought it was perpetual. He was on a tractor almost every day doing some section. I know he wasn't.
MR . BRYANT : Wait a minute. She has to ask a question. Let her ask a question.
A. Okay.
Q. (BY MS. PETRIK) After your husband passed away, who cut the fields, one, two, and three?
A. Bob, my grandsons. I don't think -- I don't know if three had been cut. I don't know. It's kind of a blur.
Q. How many grandsons do you have, Mrs. Lawrence?
A. Well, I have four if you -- I have two step grandsons and two

grandsons.

Q. What are Gay's sons' names and ages?

A. Gay's? Tim and Bob.

Q. How old is Tim?

A. He's going to be 18 in June.

Q. And Bob ?

A. He's going to be 12 in August.

Q. And Bob's sons?

A. Aaron and Adam.

Q. So the four boys and Bob would come over to the house.

A. Yeah, alternate, you know. They wouldn't all come at the same time. They would come.

Q. If Mr. Lawrence passed away in March of '93, we had the summer of '93 and '94 where Bob and the boys would come over to cut the fields?

A. Yeah.

Q. Mrs. Lawrence, who kept the tractors in repair while your husband was alive?

A. My husband.

Q. He did the maintenance?

A. Well, he did the small maintenance. We had service on them. They'd come and pick them up and take them in and service them almost every year.

Q. Do you know who serviced the tractors?

A. Yes. It's Carlton -- Carlton something.

Q. Do you know where they were located?

A. In Carlton. We bought -- that's where my dad bought the red tractor, and they would come and pick it up.

Q. Did Carlton continue to maintain the tractors after Mr. Lawrence passed away?

A. Yes.

Q. Do they still do the maintenance work?

A. Well, yeah. If I call anybody, that's who I call.

Q. When Bob and the grandsons would come over to the house, is it something that you asked them to do, to cut the fields?
A. They volunteered. I don't know that I ever asked them to come and cut my grass. They just automatically volunteered.
Q. Did they know it was something that you couldn't do?
A. Yes, and the boys had cut some. My husband had taught them to drive the tractors, and so they had done some of it before, you know, for fun. But, no, Bob volunteered right off. My only stipulation was that he never let the boys come over by themselves, and then he's the one that got hurt.
MR. BRYANT: Wait until she asks the questions.
A. I know.
(BY MS. PETRIK) After March of '93, did Bo and the boys come over to help you around the house, other maintenance?
A. Yes.
Q. Do you have a swimming pool?
A. Yes.
Q. Did they take care of the pool for you?
A. Not really. I do pretty much -- if they come over, they would, you know, clean it once in a while. I did it sometimes. They filled the chemicals.
Q. Did they help you out with the garden?
A. No.
Q. Did they help you out inside of the house?
A. Anything I need them to do.
Q. Did you ask Bob to help you with different things around the house that you couldn't do?
A. I try not to ask. I try to hire anything done, but he volunteers. If he knows I need something done, he'll do it.
Q. Do you let him do it when he volunteers?
A. Yes.
Q. What would you hire someone to do around the house for you?
A. Fix the eaves troughs and when they replaced outdoor faucets and

let's see. What else? Put up a mailbox. Let's see. What else have I -- put in a sump pump, things like that.

Q. What sort of things would Bob Hilger do for you?

A. Clean my garage, take my trash down to the road, mow. He's repaired my gate, changed the big light bulbs. I have flood lights, that sort of thing.

Q. When I refer to Bob, I'm talking about your son-in-law, Bob Hilger. If Bob didn't do these things for you, would you have to pay someone to come in and do them?

MR. BRYANT: Well, I guess you're talking generic and generalities, and we've been talking generalities here all morning. And I guess I haven't objected, but I don't know what you're talking about when you talk about these things.

Q. (BY MB. PETRIK) All right. If Bob didn't mow the lawn for you, would you have to pay someone to do it?

A. Definitely.

Q. If Bob didn't repair the gate, would you have to pay someone to come in and do it?

A. Yeah. I don't do that and there's nobody else.

Q. If Bob didn't change the flood lights, would you have to --

A. Well, the grandsons have done that, too.

Q. If Bob or the grandsons didn't do it, you would have to pay someone to come out and do it?

A. Yes.

Q. These are all things that Bob did and you appreciated it?

A. Yes.

Q. Did Bob have a set of keys to your house?

A. Yes.

Q. Did he have a set of keys to the tractors?

A. Well, he knows where they are.

Q. He knows where you kept the keys to the tractors?

A. Yes.

Q. Did Bob always call you ahead of time when he would come over?

A. No.
Q. Did he ask you ahead of time before coming over to cut the fields? Did he tell you, I'm coming over to cut the fields?
A. Sometimes.
Q. If the fields needed to be cut, Bob could just come over, get into the stable, get the tractor and cut the fields?
A. Yes.
Q. Mrs. Lawrence, is there a woodpile on anyone of these fields?
A. There's wood, yes. There's wood piled everywhere .
Q. Is there a woodpile -- let's start with lot number three. Is there a woodpile anywhere on lot number three ?
A. Yeah, along the back.
Q. You're indicating the wooded area along the property line?
A. Yes. There's wood branches that were trimmed from trees and that --
Q. A refuse pile?
A. Yeah.
Q. The branches and things that are piled up there, are they branches that were picked up from the lot and piled in the back? Where did the branches come from?
A. Trimming trees and what have you.
Q. Who piled the branches up back there?
A. My husband.
Q. Did Mr. Lawrence ever cut any trees down on any of the lots?
A. No. We've hired trees cut.
Q. So do you know when the trees -- what lots were trees cut down. on; do you remember?
A. Around the house, a couple.
Q. So you hired a landscape company to come in?
A. A tree cutting company because they were close to the house.
Q. Do you know what they did with the logs?
A. They chopped them up and took them away.
Q. Is there a refuse pile or a woodpile on any one of the other lots?

A. Oh, yeah. This junk piled --

Q. In number three ? Okay.

A. Along here, there's bushes and things.

Q. Did anyone else pile anything up on there, other than Mr. Lawrence?

A. Possibly.

Q. If you know.

A. I wouldn't know.

Q. Did Mr. Lawrence remove any brush or bushes from any of the fields?

A. Remove them? No. He was going to get a mulcher. He even looked into it and mulched up everything, but he didn't get it.

Q. Did Mr. Lawrence ever stack wood or logs on the back behind the tractor and drag it back to the pile, branches, logs, brush?

A. He had a little trailer.

Q. Did he put things like that in the trailer and --

A. Yes.

Q. And then -- which lot?

A. It would be three, to the back.

Q. So if he went -- is this the opening to three?

A. Yes. There's an opening there and here.

Q. If he went through either opening, he would go to the back of the lot and put it back against the line?

A. Yes.

MR. BRYANT: The back of the lot, you're talking about the east end of the field, correct?

A. Yes.

Q. (BY MS. PETRIK) The wooded area?

A. Yes.

Q. Did Robert ever cut any of your fields while Mr. Lawrence was alive?

A. No.

Q. Did any of the grandsons do it?

A. Yeah. They would help. Well, my husband would teach them how to, you know. They didn't really come by themselves.

Q. But Robert didn't cut any of one, two or three until after Mr. Lawrence had passed away?

A. Well, he didn't marry my daughter until about three to four years ago so I think -- now, I'm trying to think. Maybe about a year before my husband died is all.

Q. So approximately 1992 they would have married?

A. I can't remember when they got married.

Q. All right. So --

A. I think so.

Q. So Bob Hilger would not have cut these fields before 1993?

A. No.

Q. Did you ever offer to pay Bob for cutting the fields?

A. No.

Q. Did he ever ask for any pay?

A. No.

Q. Do you and your brother still have the property to the south side of your home?

A. No. It's been sold a couple of times.

Q. Mrs. Lawrence, did you and Bob ever discuss his taking over any responsibilities around your house such as cutting the fields? Did you ever have a discussion with him about it or was there just an understanding that it would be done?

A. Well, like I said, mostly, the boys did it. He'd come with them and he'd cut once in a while I guess. But no, it was just that the boys would do it.

Q. Did you ever ask -- was there ever a discussion that this was a responsibility they would take over for you?

A. Yes, the boys.

Q. You talked to the boys about taking over this responsibility?

A. Yes.

Q. Do you know who you spoke with?

A. Probably all of them that I'd need help for it, you know, that they'd have to help me.
Q. Do you remember when this discussion occurred?
A. Probably that first summer.
Q. 1993?
A. '93.
Q. Was Robert present during the discussion?
A. Oh, I don't remember.
Q. Was it with all four grandsons?
A. I think it was the three oldest anyhow. The other one was a little young. He doesn't drive the tractor.
Q. So when you talked to the three oldest grandsons, you indicated you would need help around the house and that mowing the fields would be part of what you needed help with?
A. Yes.
Q. And they agreed to help you out?
A. Yes.
Q. If the boys agreed to do this, how did Robert get involved?
A. Well, he would have to go with them. He'd have to be there because they would usually do it while I was at work, and the boys then got jobs and they weren't always all available at the same time. So he would come with one and usually they'd each drive a tractor.
Q. When you say he, you're talking about Robert?
A. Yes.
Q. Prior to August 15th of 1994, did you ever tell Robert about the woodpile along the east end of your property in lot three?
A. No. I mean – no.
Q. After August 15th of 1994, did you and Robert ever discuss the woodpile? Did you tell him about the woodpile back there?
MR. BRYANT: Are you still talking about the one at the east end of lot number three?
Q. (BY MS. PETRIK) I'm sorry. Lot number three?
A. I don't know that he did. I hadn't even been out there to see it.

Q. Never?
A. Oh,-years ago, but that's a long walk through the tall weeds.
Q. Mrs. Lawrence, did you know that Robert was going to come over on August 15th to cut your fields?
A. No.
Q. Where were you?
A. I was out of town for about -- I don't know if I was gone three or four days.
Q. Do you remember the fields being long, the back field being long?
A. Yes. Yes.
Q. So it would require cutting?
MR . BRYANT : Well, I'll object to that.
(BY MS. PETRIK) You remember number three being long, field number three?
A. I imagine.
Q. Do you remember if Robert cut number three at all during the summer of 1994, prior to August 15th?
A. See, I can't see that field.
MR . BRYANT : Just answer the question.
A. Well, I can't see it, so I never --
MR . BRYANT : Well, if you know, answer the question. She didn't ask you if you could see it. She asked you--what you knew.
A. No.
Q. (BY MS. PETRIK) Do you know if Robert cut field number two during the summer of 1994 prior to August 15th?
A. I don't know if Robert did, but somebody did.
Q. Do you have any idea how many times it may have been cut?
A. It was cut about once a month.
Q. What about field number one, number one, the area of the house and the stable?
A. About every two weeks.
Q. Do you know who cut that?
A. The boys.

Q. Did Robert ever cut it during the summer of '94?
A. He might have.
Q. All right. Mrs. Lawrence, when did you learn of the accident of August 15th of 1994?
A. My daughter called me at work where I was staying and told me.
Q. And what did she tell you? .
A. That she was in the hospital, that he had been hurt from the tractor.
Q. And did you come home or did you stay where you were?
A. No, I stayed where I was and I stopped and saw him on my way home at the hospital.
Q. Did Gay tell you how he was hurt on the tractor, what had happened?
A. Something about I think he hit a log and almost tipped over, but he caught his leg and he was hanging by his leg.
Q. Did she tell you in what field this happened?
A. Behind the barn, yes.
Q. Which would be field number?
A. Three.
Q. Mrs. Lawrence, who is Hank, is it Prutikis (phonetic)?
A. Hank. I don't know how to pronounce his last name.
Q. Who is he?
A. He's the neighbor that lives on the ten acres next to us.
Q. Which side?
A. This side, north.
Q. How long has Hank lived there?
A. Maybe --
Q. If you know, approximately.
A. I don't know. I don't know.
Q. Have you ever spoken to Hank about August 15th, 1994?
A. Yes.
Q. What did Hank tell you?
A. Basically, he told me that he was working in his garden. He sells

vegetables and he was working in his garden and he heard the tractor, so he knew somebody was working over there, and then all of a sudden he heard yelling. So he figured -- he has a tractor like it, and he figured that something happened with the tractor. So he said he jumped on his tractor and went around and told his wife to call 911, and he was looking for him and he come up our property and went where he could hear him yelling, and he said he was just dangling, hanging there by his leg.

Q. Did Hank tell you whether he rendered any aid to Robert?

A. Well, he took him down and laid him down.

Q. Did Hank indicate that the tractor had stopped in front of a tree?

A. No, he never mentioned it. .

Q. Mrs. Lawrence, have you ever spoken to Robert with regard to what happened on August 15th of 1994?

A. Oh, he described what happened.

Q. What did he describe about the incident?

A. About the same thing. He says he was just going and all of a sudden he hit this log.

Q. Did he ever take you out to the field to show you?

A. Yes.

Q. You have seen the area where Robert hit the log?

A. Yes.

Q. Have you seen the log?

A. Yes.

Q. Is the log still there?

A. Yes.

Q. Has anyone moved it?

A. No.

Q. Is that the first time you saw the log?

A. Yes.

Q. Now, you indicated you were out of town and you came back and you went to the hospital to see Robert?

A. Yes.

Q. What hospital was he in?
A. Seaway in Trenton.
Q. Do you know how long he was there?
A. Oh, gosh, it seems to me he was in there about a week.
Q. Mrs. Lawrence, when you went to see him at Seaway, did he tell you the extent of his injury?
A. In Seaway?
Q. Yes.
A. He was groggy.
Q. I did not talk to him. I did not stay long. I just went in to see how he was doing, but he was real groggy.
Q. Did Gay talk to you at the hospital?
A. I imagine she did.
Q. What was your understanding of his injury at that time?
A. The doctor that looked at him said it was the second worst --
MR . BRYANT : She just asked you what the injury was.
A. Crushed bones.
Q. (BY MS. PETRIK) Crushed bones where?
A. All in his leg.
Q. Do you know which leg?
A. Left leg I think.
Q. Is that the extent of your understanding of the injury?
A. Well, I think there was nerve damage.
Q. Anything else you can think of?
A. I don't know.
Q. Okay. That's all right. Has Robert or Gay indicated to you that he, that Robert, may require bypass surgery on that leg?
MR. BRYANT: Well, I'm going to object as to what may have been indicated to her. It's immaterial and irrelevant.
Q. (BY MS. PETRIK) Did you see Robert while he was confined to a wheelchair?
A. Yes.
Q. Do you know how long he was confined to a wheelchair?

A. No.
Q. Was it following his discharge from Seaway hospital?
A. Yes.
Q. Did you see Robert while he was on crutches?
A. Yes.
Q. Was that following the confinement to a wheelchair?
A. No, I think he had a walker first.
Q. Okay. Did you see him with that?
A. Yeah.
Q. Do you know if he's still treating with any physicians?
A. Oh, yeah.
Q. Mrs. Lawrence, did you ever go out to your fields two and three and ever walk around, look around your fields in the summer of '94?
A. Oh, in '94? No.
Q. When did you go out to field number two to walk around?
A. Last year. I was looking for something.
Q. Did you ever go out to field number three and look around?
A. No.
Q. Is there anything that prevented you from going out to field number three and looking around in 1994?
A. Yeah. Usually high grass, but also, I think there are coyotes back there and I really don't want to go back there.
Q. That's in field number three?
A. Yes. I think they've got a den back there.
Q. I'm sorry?
A. I think they've got a den back there.
A. Of coyotes?
Q. Yes.
Q. All right. Other than the coyotes back there, is there anything that prevented you from going back to number three?
A. Nothing prevented me, but nothing made me want to go either. That's a long walk.
MR. BRYANT: She hasn't asked you a question.

Q. (BY MS. PETRIK) All right. How far of a walk from the house is field number three?
A. It's too far for me. I can't even walk to the road.
Q. Since August 15th of 1994, who has cut fields number one, two, and three for you?
A. The boys.
Q. The grandsons?
A. Yes.
Q. No one else has cut those fields?
A. Not those fields.
Q. Has anyone -cut anything else?
A. My backyard.
Q. Which would be behind the house?
A. Behind the house and the immediate front yard, like up to here.
Q. Which is part of lot number one?
A. Yes.
Q. Who cut that for you?
A. My nephew. He has a lawn service. He's always done it, even when my husband was alive.
Q. Do you pay him for that?
A. Yes.
Q. Does your nephew cut number two?
A. No, never.
Q. Does he cut number three?
A. No.
Q. Prior to August of 1994, were you aware of any condition in lots number one, two, or three that could have resulted in injury to anyone?
MR. BRYANT: Well, I'm going to object to the form of the question. You're talking about any conditions. I'm not sure whether stones out there that somebody can trip over or what you're talking about.
Q. (BY MS. PETRIK) All right. In the summer of 1994 prior to August 15th, were you aware of any logs, stones or rocks in field number three that anyone could have --

A. Well, I knew there was something back there. There was, you know, junk piled back there, but no specific --

Q. Did you ever tell Robert about the junk piled up back in lot number three?

A. No. I figured he could see it.

Q. And when you say junk, are you referring to --

A. The pile of brush.

Q. Along the fence line?

A. Yeah, along the fence lines.

MR . BRYANT : You're indicating on the eastside of lot number three; is that correct?

A. Yeah. That's where the pile of brush is.

Q. (BY MS. PETRIK) Mrs. Lawrence, do you still own the two tractors that are in Exhibit 2, 3 and 4?

A. Yes.

Q. Since the growing season has not started yet for 1996, is the grass short in lots one, two, and three?

A. Yes. Well, I don't know about three. But it's not bad here.

Q. You don't go back to number three?

A. No.

* * *

Q. Since August 15, 1994, have you observed any changes in Robert?

MR. BRYANT: Well, I guess I'm going to –

Q. (BY MS. PETRIK) Physical changes in Robert?

MR. BRYANT: Meaning he's got a broken leg?

A. He's crippled.

MR. BRYANT: We'll stipulate to that.

* * *

Q. (BY MS. PETRIK) How many times have you spoken to Robert about the incident of August 1994?

A. Not many.

Q. By not many, approximately?

A. All told, about the incident itself, probably just that one time after

he came back from the hospital and took me out there and showed it. We haven't discussed the actual incident. I ask him how his leg is doing and he tells me when he goes to the doctor.

* * *